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Real Property by Judge Deane

The Judge previously to his entering particularly into the principles of real property proposes to give an historical delineation of its rise & progress to the present time

It is somewhat difficult to define real property as contradistinguished from personal property. Real property is said to be permanent fixed & immovable — Personal to be moveable & such as may attend a mans person wherever he goes & such as is included under the comprehensive term chattels It is not true however that all personal is moveable for the property enjoyed under a lease for years is as immovable as any other although it is personal — Nor is real property always possessed of the qualities of visibility & tangibility for an equity of redemption is real property

But again real property is defined to be such as descends to the heir whereas personal property is such as goes to the Exr — Yet a life estate is real property although it is a freehold not of inheritance & cannot descend to the heir At any rate whatever descends to the heir is real property & whatever goes to the Exr is personal property Rents for years go to the Exr and are therefore considered as personal property

Real property is Corporeal or Incorporeal —

Corporeal means Land which includes every thing adhering to the earth as trees houses mines &c & extends upwards as well as downwards. — Incorporeal is that which cannot be seen handled or touched. It is a creature of the mind & exists only in the minds eye. It issues out of something corporeal.

This a man may have a right of way over another man's land which is real property and will descend to the heir. So also with common or an equity of redemption which is real property & will descend to the heir. So to whom one man has a rights of fishing in water that belongs to another man this is real property & will descend to the heir on the death of the ancestor.

It was before observed that there is a species of real property which does not go to the heir viz. an estate for life

Suppose then an estate is given to A. B. for the life of Stokes what becomes of the widow of the estate if Stiles dies before Stokes &c. E.L. there is no provision made in this case, but there is a provision made in most of the States in this country by Statute. If the estate had been given to Stiles & his heirs then his heirs would have taken the residue. but then it is given to Stiles only & not to him & his heirs. therefore the residue cannot go to his heirs. It cannot go to his Ex: because it is an estate of freehold. for no freehold can go to Ex^rs. Now according to the Law of Eng if it is real property & no heir to take it it must escheat. but in this case it cannot escheat for the donor has parted with his interest for the life of Stokes & he is yet alive. This estate was then spun as in a state of nature to the first occupant until a Stat. of Car. 2 converted it into personal property to go into the hands of Ex^rs for the payment of debts

When real property reposes to the heir. the law specials in trust vests in him & he owns it just as his ancestor had it before him liable indeed to the debts of such an ancestor — But personal property vests in the Ex^rs as a trust to

only he has the legal estate entrusted to him for the payment of debts & has no beneficial interest unless there is a residuary left.

Before we proceed any further in this subject there may be some advantage in tracing the history of real property.

When the northern nations broke in upon the Roman Empire they had no ideas of lands as we now have. It was supposed that the chieftain had a right to distribute the conquered lands to his captains & other great men & this he accordingly did. - which no doubt is the origin of the aristocracy of Europe. The great men parcelled out land so received to their vassals who held them at the will of their lord upon condition of performing certain services & so long as they held them they were bound to perform these services.

But men were not satisfied at holding in this manner so therefore soon became common to parcel the land out to the grantee for years & then afterwards for life. which latter seemed to be the ne plus ultra of feudal liberality. Hence arose the idea that if an estate was given to a man without saying any thing further it should be construed it should be construed to be an estate for his life, because a life estate was all he could have given at that time, & this rule still holds on the principles of the C. L. But when men became more settled they desired to have a still more certain interest & wished the land given to them & their posterity. It became therefore necessary to use some word which should import this descendible quality & distinguish such estates from estates for life & therefore

this was the time that the word "heir" was was introduced this word was then adopted & has continued in use ever since — But as it was impossible all the children should take it descended to the first son only & hence the doctrine of primogeniture. — By the word "heir" however at that time was understood a person who was lineally descended from the grantee & it was settled at law that such person should be "of the blood" of the first purchaser. But words "of the blood" have undergone an entire alteration in their meaning since that time. for now they do not mean merely those lineally descended as formerly they did but will include collateral as well as lineal descendants. Formerly the estate must have gone only to those lineally descended from the first taker, but now it may go to collaterals also. "Of the blood" now means of kin or related to, what period this alteration was made I know not, but in the Stat of Hen 8 which says that dower "should be granted to the "next of kin" the words translated "next of kin" were "proxime de sanguine" therefore next of blood means related to or of kin. Observe that next of kin does not mean generally but proximity of blood.

During all this time there was no such thing as the alienation of land. — It happened however at length that both by permission of the great lords or barons became alienable & the mode of alienation allowed at first to be by one half of the land but afterwards to the whole if the heir consented. — This was the law before any Stat. was made on the subject. The Stat. of Henry I was the first law that empowered a man to sell his lands and by that law he might sell one half of what he had provided

and the whole of it if the deed of purchase contained the words ac ejus tenet of lands that had descended to him from his ancestors he was entitled to alienate but not from the. But by a Stat of Hen 3d he was empowered to alien one half of lands descended to him.

Again by the Stat of quia Emptores 13 Ed. 1st persons holding real property whether purchased or acquired by descent except the kings tenants in capite were empowered to dispose of the whole of it. And after as these tenants in capite were allowed to alien upon paying a fine, but now by a Stat of Car 2 fines for alienation are abolished in all cases. Here however arose a difficulty for how could a man sell that land which had been given to him & his heirs? This difficulty was got over by the construction put upon the word "heirs" which was held not a "descriptio personae" but only a description of the quantity of interest which a man took being a fee simple, which was alienable. but if not alienated went of course to the heirs.

The great men grew uneasy at this. therefore they continued to make conveyances to their children & their heirs of their bodies supposing that then the property could not be alienated. This had the desired effect for a long time by tieing the property in the succession prescribed without the power of alienation. but at length the construction given to these estates by the Judges was that they were fee simple conditional & that therefore when the condition was performed by having heirs of the body, the estate became absolutely vested in the grantee & he might do what he pleased with it. so that by this construction the whole plan of the nobility was defeated. But after this Edw. I who wanted the assistance of the nobility enacted

the Stat "de donis" declaring that the estate should descend to the heirs & could not be alienated & this was the origin of entailments But afterwards a way was found of docking these entailments & now it is an incident to estates tail that they can be docked & turned into fee-simple. but if they are not docked they will go to the heirdom.

After collateral relations began to be let in to the inheritance, it became a settled principle that such relation must be of the blood of the person from whom the estate descended. But suppose the estate was acquired by purchase by the person from whom it last came. Then this principle could not apply for how could his collateral relations be of the blood of the person from whom the estate descended. when it was not acquired by descent but by purchase. In order to avoid this difficulty they fictitiously supposed that it descended & they at first supposed that it descended from the father so that the collateral relations let in by this would be the brothers & sisters of the deceased. but if there were no brothers & sisters then they supposed that it descended from the grand father & this let in the uncles & aunts of the deceased & so they went up the paternal line until some collateral relation was found coming from that line. but if there were none to be found then they pursued the same method in the maternal line & if no collateral relations were found from that quarter then the estate escheated.

Long after estates became alienable & descendible they continued not to be devisable. In order to avoid this inconvenience men conveyed away their estates to their own

uses & the use was then held to be devisable. The clamellors in those days were all ecclesiastics & they would be wont to uphold such devise because the devise were generally made to ecclesiastics. This practice of conveying away their estates to the use of themselves was adopted by the nobility during the wars between the houses of York & Lancaster, thereby avoiding a forfeiture of their estates when any of them were attainted for a use was held not to be forfeitable. But the Stat 27 H. 8 declared that the use & possession should be considered as one & the same thing & then of course this put an end to the use, & estates were again held to be by no means devisable.

But immediately after this the Stat of wills 32 H. 8. was enacted & explained by 34 H. 8. declaring that men might devise their real property — It was indeed confined to "all lands in socage & two thirds of what were held in chivalry but this distinction is now abolished by 12 Car 2. Thus at length lands became devisable as well as descendible & chargeable.

Before we abandon this historical view let us enquire when lands became liable for debts. By the 13 Edw 1 lands first became liable for debts, one half of them being then held liable for debts of a certain description viz those due by Stat merchant & Stat Staple. There was no judgment confessed requiring nothing but an execution. Afterwards lands became liable for all specialty debts & in the time of Hen 8 a moiety of them became liable in the like fashion if the debtor for any debt of his whether specialty or simple contract & afterwards they were all liable for bankruptcy.

But after the death of the owner lands are only liable for specialty debts. The method of taking lands by execution is different in the different states. In the eastern states the land is taken & appraised off in the middle states the land is taken & sold at the post. There are different statutes on the subject in the various states.

This having taken a short view of the history of real property & having seen how & when it became alienable descendible & devisable. we will next inquire into the different estates that may be had therein

There are but three kinds of estates in real property known to the Eng. law. & these have certain invariable qualities & incidents. The different kinds of estates are I Estates in fee simple. II. Estates Tail & IIIIII. Estates for life. in the which last are included estates for the life of the donee estates pur autre vie & estates resting on contingencies.

I Tenant in fee simple is he that hath lands tenements & hereditaments to hold to him & his heirs for ever generally absolutely & simply without mentioning what heirs. 2 Bl. Com. This estate if created by deed requires certain technical terms so that if you wish to create it by deed you must give the property to a man & his "heirs". But a fee simple may be created by will without using the words that are necessary in a deed if it be the obvious intention of the testator to create such an estate. Thus in a devise the words "all my effects" "all my estate" and even "all I am worth" will convey an estate in fee simple

if testator had so much, now the intention is of no consequence in a deed whereas it always governs in a will. This distinction is attributed to the more enlarged & liberal mode of thinking which prevailed at the time of enacting the Statute of Wills when the human mind began to burst the shackles of technical strictness by which it had been enchained. For the intention & you fit the construction in a wise manner however that this intention must be consistent with the rules of law. This however refers to the thing to be done. The law not requiring the same technical nicety in creating an estate by devise, as by the other modes of conveyance. So a man may create a fee simple by will without the words "Heirs" when he could not by deed - the creation of this estate is perfectly lawful but he could not devise his person as property for his heirs because the law forbids it.

Formerly in Eng. words both of purchase & descent were necessary to create an estate in fee simple. But now a grant to "A & his heirs" will create such an estate. What particular heirs have the benefit of such grant or the death of the ancestor is regulated by the laws of descent & the word "heirs" is only a description of the quality & duration of the estate & not of the mode in which it shall descend.

This fee simple is the largest interest which can be holden & by the Eng. law if there are no heirs to be found it will go back to the original grantor, but in this country there is a general provision made that in such cases

the public will take the property —

Incidents to a fee simple. It is necessarily from its nature alienable and the owner may dispose of it at pleasure. It is descendible to the heirs general collateral as well as lineal. and it includes those in the ascending line - that being contrary as says Bracton & Coke to the rules of gravitation. — The words "heirs general" do not mean every child alike but have reference to the laws of descents. The lineal heirs are always preferred to the collateral. If a man has been seized of the estate at any time during coverture. his wife on his death is entitled to dower in it viz one third. — If it were the wife who died possessed of such estate then the husband would be entitled to his curtesy if issue had been born in the life time of the mother capable of inheriting the estate. Observe however that it is not necessary that she should actually have had a child born to entitle her to dower — It is sufficient if she might have had a child capable of inheriting the husbands estate. But in order to entitle the husband to curtesy it is absolutely necessary that a child be born in the life time of the wife capable of inheriting the wifes estate. Again he is not entitled to the curtesy if she were not seized of the estate. but she is entitled to dower whether he was seized or not provided he had a right to be seized. & the reason of this last distinction is that he always had it in his power to bring the estate into possession but she had it not in her power to reduce his right into possession — The owner of land in fee simple may commit waste & he is accountable to nobody. —

It has been before observed that technical words are not necessary in order to convey a fee simple by will but in a deed they are necessary & that the intention is always to prevail in the case of wills. This principle of intention is carried through all the cases except one & that is where a man devises an estate describing it per se: thus when he says I give my farm lately occupied by A.B. now if he does not intend the word his notwithstanding it is his manifest intention to convey a fee simple, yet the devisee can take but an estate for life. We, in Con. give the same effect to a will describing the estate per se as to one containing the words "my estate" which we have before seen would convey a fee simple - this says Ram is the only difference in the construction of wills in Engd & Connecticut.

III An estate known to the Eng laws is an Estate Tail This is an estate given to a man & the "heirs of his body" & is not descendible to the heirs general - For the history and origin of this estate consult Blackstone. The St. de donis restrained this estate to descend in the family of the grantee in infinitum according to the inscription prescribed. This could not be explained or construed away. It was a long grievance and at length a remedy was discovered for it which is termed barring an entailment. This is accomplished by a friendly suit called a common recovery for a description of which see Blackstone. The Judge has himself witnessed the farce of a common recovery in this country since the revolution - but when the entailment is not

docked it will descend to the heirs—

There are different kinds of estate tails. They are either in tail general or special the estate in tail general is one to A.B. & the heirs of his body begotten. it is so called because however often the donee in tail may be married his issue in general by all and every such marriage is in successive order capable of inheriting the estate tail for former done The succession of heirs is regulated by the the laws of descent and collateral relations are excluded

An estate in tail special is one restrained to certain particular heirs of the donees body as an estate to A.B. & his heirs on his present wife Mary to be begotten lawfully

Estates tail are further diversified by several distinctions in most entails for they may be in tail male or tail female: as if lands be given to "A.B. & the heirs male of his body" this would be an estate tail male general but if to "A.B. & the heirs male of his body begotten on his present wife Mary" this would be an estate in tail male special & substituting the word female for male it would then become an estate in female general or female special tails— If there are no such heirs & the entailment is not docked. the estate being spent the fee will revert to the donor. In case of an entail male the heirs female can never inherit nor any claiming thro them Co. Lit. 20 & 2 a converse of an entail female—

Thus if the donee in tail male had a daughter who also leaves issue a son. such grandson not being able to claim as his descent from the donee by this male cannot inherit nor can any of his descendants & vice versa—

Some disputes have arisen with regard to this question & the later authorities seem inclined to say that this son might be inherit if his mother dies before her father. for then he the grandson is entirely to the father & he is made him. then being made heir of his body he should take per formam doni -

The principal incidents to an estate tail under the St of West. 2 are the following - Tenant in tail may commit waste. Husband of tenant in tail is entitled to ~~the~~ curtesy. Wife of tenant in tail is entitled to dower - An estate tail may be barred by fine & recovery & by a lineal warranty descending with assets to the heir. In the 12th year of Edw 2 recoveries were first held sufficient to bar estates tail. In Com. there is a St. enacting entailments it has not altered the Eng doctrine only in limitation or duration of the estate: it remains an estate tail in the donee but becomes a fee simple in his children: it is mostly allied in many instances to a fee conditional at C.L.: it was enacted here to provide for families & to prevent spendthrifts from wasting the substance of their children - it is properly an estate tail in the tenants life & it has been decided that his wife is entitled to her dower in it -

In revival of the State entailments have been abolished. When a stat has declared that an estate tail shall not be made; what would be the effect of limiting by deed an estate to a "man & the heirs of his body" would such words make an estate for life or a fee simple? -

Judge Rose conceive that it would create an estate in fee simple. In some of the States they have left their estates as they were before the St de donis. that is fee conditional at C.L.

Estates in fee simple & Estates taile are the only estates that can descend that is they are the only estate of inheritance the latter descends per formam doni & is limited to a particular mode of descent. but both are governed by the laws of descent. — All estate of inheritance are also freehold but all estates of freehold are not estates of inheritance as estates for life of any kind or estates depending on contingencies which may last for life - in these cases one may have the freehold & another the fee simple

If an estate taile is created by deed the words heirs of his body must be used, but in a will this strictness is not required there the intention will prevail if consistent with the rules of law. If these words are not inserted in the deed it will be but an estate for life —

If an estate be given to a "man & his male heirs" this will be neither a fee simple nor a fee taile but merely an estate for life. It cannot be a fee simple because it is restrained to particular heirs viz his heirs male, it can not be a fee taile because it is descendible to all his male heirs & not those of his body only, it must therefore be an estate for life. But it is now understood that in this case the word male shall be stricken out & then the grantee will

take as if it had been given to "him & his heirs" that is he will take an estate in fee simple—

The words lands, houses, outhouses barns orchards waters &c are very often tho' unnecessarily, used in deeds. They were formerly first introduced through the avarice of clerks who were handsomely paid for writing. But the term land passes every thing and the word "farm" when the land is properly described will convey as well as land. The word land will include the emblements, that is the crops growing on the soil. Emblements do not include the natural growth of the soil, they are only the annual artificial profits. A Deed then will operate as much upon the emblements as upon the land. with regard to the doctrine of emblements we will have more time in another place to speak of it—

It is a rule that a man may convey by deed & except any thing in the deed unless it be the whole thing conveyed. for this would be nugatory. Therefore he may convey land & except timber, wood buildings &c. In fact he may except any thing on the land & convey it to another or retain it himself— If a house is excepted this is not an exception of the land on which it stands, but if the land is excepted this is an exception of all the houses standing on it 8 Co 187.

Rent is one species of real property of an incorporeal nature having the appearance of personal property in every other respect though that it descends to the heir & does not go to the Ex. viz. an annuity which is a claim upon the person of another Co. Litt. 2.

Or devises no words of perpetuity or inheritance are necessary to vest a fee simple — When an estate had been given to A & B & his it was held that there was such a want of certainty that it could not be considered a fee simple but only an estate for life — It has been decided it would have been otherwise in a will 6o. Litt. 8.

There are some things that may be done by will which are unknown to L.L. & could not be done by deed. Thus if an estate is given to a man & his heirs forever and on the happening of some contingency to go over to another and his heirs forever — now this was what could not be done by deed it being a maxim that a fee simple could not be limited on a fee simple. yet it may be done by a devise. This is what is called an executory devise of which more will be said in a subsequent place. Again by a deed you cannot make a freehold estate to commence in future. but by an executory devise you can. if it does not amount to a perpetuity — Again you cannot by deed create an estate for life out of an estate for years but by E. & C. devise this may be done the reason why it could not be done by deed was that an estate for life is greater than an estate for years. it is of higher dignity and the creating of an estate for life was held to be a destruction of the whole term 6 co 6a 590.1 The three last mentioned cases they may all be effected by means of executory devises.—

If a grant be made to "A & his successors" this will be only an estate for life. But in corporations the word are

successors answers the same purpose as the word heirs in grants to individuals, & if it be a sole corporation either successors or heirs is absolutely necessary to be inserted, but attin as to other corporations for a grant to a corporation aggregate will convey a fee simple without words of succession inasmuch as such corporations never die.

There are two some exceptions to the general rule that the word "heirs" is necessary to convey a fee as in the cases of corporations just mentioned. so two when of persons holding an estate in coparcenary or wishes to convey his portion to another no words of inheritance are necessary & in the case of devises vide ante b.o bar 290.1

A fee simple conditional answers nearly the same purpose as an estate in fee simple limited after a fee. this is called a base or qualified fee for having some condition annexed to it or the happening of which the estate must determine Co Lit 27 or 127.

A conditional fee at C.L was a fee restrained to some particular heirs in exclusion of others as to the heirs of a mans body or to the male heirs of his body &c this was termed a conditional fee by reason of the condition expressed or implied in it. that if the donee died without such particular issue or heirs it should revert to the donor but if he should have such heirs it would remain to the donee—

A tenant in tail may sell his interest in the estate but cannot affect the heirs, for if he disposes of the estate for his own life it will be good against him, but the estate tail must descend unincumbered to the heirs.

If tenant in tail conveys an estate in fee simple such conveyance is voidable by the heir. His only method of barring the heir is by fine or common recovery — the word fee is improperly applied to estates in this country for our soil is held in a tenure strictly allodial — & instead of escheating the land would go to the first occupant unless expressly ordered otherwise by statute —

III-IV. Estates for Life — These are of two kinds. conventional & legal — conventional are such as are created by the act of the parties — legal such as arise by construction and operation of law — the former comprises lands made to one for his own life. or for the life of any other person or for more than one life and all estates created by the act of the parties & depending on contingencies: it comprises every estate that can be created by the act of the parties if for life —

Every estate is an estate for life that has no determinate period fixed for its duration if not an estate of inheritance & which may possibly last for life. But if it has a determinate period fixed it is only an estate for years & is personal property. Legal estates for life or those created by operation of law are 1st Tenant in tail after possibility of issue extinct — 2d Tenant in dower & 3d Tenant by the curtesy

The incidents of conventional & legal estates for life are the same — The tenant unless restrained by special agreement may take reasonable estovers or botes but cannot commit waste that is he may take what is necessary to his own convenience or what is necessary to enable him to perform his duty in respect to the premises as repairing &c. but he cannot cut

timber to sell but he may cut it in order to make repairs unless the lessor has agreed to repair. In a legal estate the lessee is always bound to repair — It is a common thing for a tenant by special agreement to secure himself from waste committed by third persons, for by the principles of the C.L. he is liable for the waste of others. as when the house is torn down by a mob he would be liable at C. L. if however the ruin happens by the act of God he is excused, but not otherwise. for in the other cases he may have his remedy against the wrong doers. It was the object of the C.L to secure the interest of the lessor—

The tenant shall not be prejudiced by any sudden determination of the estate. for if a tenant for life sow the land & die the emblements belong to his Ex^r. for "actus dei nemini facit injuriam". So if a man be tenant pur autre vie & cestuy que vie die after said sown & before harvest the tenant shall have the emblements. The rule is the same if the estate be determined by the act of law—

Whenever a person sows land & cannot foresee that that he will also reap the crops. if he is prevented by death his Ex^r. shall have the emblements. but if he could have foreseen that his estate would be at an end before the crops were ripe. then the emblements shall belong to the lessor. because it was the tenants own folly to sow that which he knew he could not reap. So in all cases, where the estate is determined by the act of the tenant himself the lessor will be entitled to the emblements. thus when an estate is given to a woman during her widowhood & she marries the lessor will have the emblements.

Who shall have the emblements in the conveyance of land? He to whom the conveyance is made unless the emblements are excepted. This is the rule with regard to deeds. but there seems to be some question with regard to a devise. would the devisee take the emblements? Whence is the difference? In the conveyance by devise was not the crop as much in contemplation by the party, as in the conveyance by deed? The current of authority seems to say that the Ex. not the devisee will take if the devisor was in health at the time of making the devise. but if the devise was made when the devisor was on his death bed, that then the crops shall go to the devisee because it is presumable that they were in the contemplation of the party. I should suppose that they were as much in his contemplation in the one case as in the other. —

Mr. Bl. Blackstone observes that emblements are distinct from the real estate in the land & subject to many tho' not all the incidents attending personal chattels. They were devisable by testament before the Stat of wills & at the death of the devisor shall vest in his Ex. & not in his heir. they are forfeitable by attainder in a personal action. but by 6 E. were not distrainable for rent arrear. Tho' the emblements are assets in the hands of the Ex. & are forfeitable upon attainder yet they are not in other respects considered chattels & particularly they are not the object of larceny before they are severed from the ground 2 Bl. 403. —

Under tenants or lessees of tenants for life have all the privileges of their lessors and this additional one that when the estate is determined by the act of tenant for life. the under tenant shall

have the emblements —

Life estates are liable to forfeiture for waste & the action at L. is brought for the recovery of single damages & the thing wasted, but by the Stat. of Gloucester. Pltff may recover treble damages & the thing wasted —

These estates may also be forfeited by the tenants instituting to convey greater estates than they have themselves for according to the feudal ideas this was a species of petit treason against the Lord Lord —

Estates for life, which arise by operation of Law —

II Tenancy in tail after possibility of Issue extinct —

This is gennally ranked under estates for life, but more properly it seems to form a middle link between estates tail & estates for life. This estate happens when a special entailment has been made & the wife out of whose body the issue was to spring dies without issue, or having left issue that issue becomes extinct, in such case the husband becomes tenant in tail after &c — He is not liable for waste & in every other respect besides this he is as tenant for life — although he is not liable for waste he gets no property by committing it, for if he cuts down timber it belongs to the remainder man or reversioner if claims it. Co. Lit. 28. 4 Co. 50.

III Dower. The law respecting this is almost universally the same in the United States as in Eng. The intention of dower is to provide a suitable maintenance for the wife of a deceased husband — & in some respects it differs from every other estate —

By the Eng. L.L. the wife upon the death of her husband is entitled to an estate for her life of 1/3 of all the lands of which the husband was seized in fee simple or fee tail at any time during coverture. — In Con. the wife is entitled to dower in those lands only of which the husband died seised — To entitle the wife to dower the estate must be such an one as that if the husband had issue by the wife it might have inherited. — therefore an estate in special tail might not in some cases be subject to dower if this it can only be said "ita lex scripta est." —

The right of wife to dower creates great difficulty in the alienation of estates being an incumbrance of which a sale could not divest them. To remedy this in Eng. alienation by Fine & common recovery were used which were judicial conveyances by the husband & wife jointly. In this country the same may be effected by her joining with the husband in any of the L.L. conveyances.

This estate has some peculiar incidents & privileges which other estates have not — it being one which the law protects with singular anxiety —

It is an estate which is not liable for the debts of the husband. therefore if a man die having in his possession a large estate. the wife will be endowed & the creditors cannot deprive her of it even although they may be losers by her taking dower Co Lit 140.

Dower cannot be devised from the wife by will nor taken from her by act of law. But in personal property the husband can at any time by disposing of it bar the

wife of any part of it. —

There are many cases in which a woman is barred of dower. — The husband may be an alien & incapacitated thereby from holding land. of course the wife of such alien cannot be endowed. Co Litt 31. for although an alien may hold property if it is not taken from him. (which it is always liable to be) yet it can never be secured from him — If she is an alien herself she is not entitled to dower. If she is naturalized she may have dower out of all the lands which he acquired after her naturalization but not of those he had before — A woman divorced a vinculo matrimonii cannot be endowed & this proceeds upon the ground that she never was a lawful wife Calit 33 If a wife is under nine years of age she cannot be endowed. A wife may bar her dower by an act of her own as by an elopement with an adulterer & the husband not reconciled to her. This is by reason of the Stat. West. 2. If the husband voluntarily receives her again she will be entitled to dower. This elopement is no forfeiture of a jointure or anything she is entitled to by marriage articles. for these were not known at the time of enacting the Stat. West 2 & therefore could not be barred by that Stat. 2 Inst 435. 1 Vs. 455. 3 P. Wms 269. —

Seisin in law of the husband is the same for securing the wifes dower as a seisin in deed or actual seisin

In the case of joint tenancy the wife cannot be endowed because of the "jus accrescendi" or right of survivorship to one joint tenant in case of the death of the other

Neither can estates in jointenancy be dowed because the title is ambulatory or as Finch expresses it the agility of the title or right of survivorship is so great that it vests before the dower can have a title. A wife is entitled to dower out of incorporeal hereditaments as a right of common. a fishery &c. for this is real property. A wife cannot be endowed of an office. The law of dower is much the same here as in Eng.—

A jointure is the great thing which bars dower— This is a provision made for the wife by the husband in lieu of of dower. On this subject equity & law are obliged to each other.— A legal jointure is to the following requisites 1st must be made before marriage for then the woman is sui juris capable of judging of the competency of the jointure & is not under the coertion of the husband for if it was not then made before marriage she might be barred of her dower by an insufficient jointure. 2d It must be a competent livelihood by which is meant a livelihood proportionate to the husbands estate 3d It must be given to her to take effect immediately on the death of the husband.— 4th It must be real property, because real estate is more permanent & cannot be easily spent. 5th This conveyance must be made to herself & not to a trustee for her. 6th It must be for her own life & not for the life of another

If all these requisites are complied with it will be a complete bar to dower. A jointure was made a bar to dower by virtue of the Stat of 27th Hen. 8. — If the wife disclaims the jointure on the ground of incompetency— this

this is to be tried by the court & jury & will be determined according to the quality of the estate & the property of the husband. — In Chancery a jointure is different. there the rule is established that if the estate is sufficiently valuable it is a good bar of dower no matter what kind of an estate it might be 3 Bro. Par. Ca 492.

Whether a jointure depends for its validity on the contract of the wife has been a litigated question. If it does it is observable although the wife is at the time of the contract sui juris under no actual or presumed control of the husband, yet she shall not be holden to her contract if she has made an improvident bargain, when under the influence of that unbounded confidence which a female is disposed to place in the honourable intentions of her suitor —

It has been a question much agitated in the Eng. courts whether a jointure settled on an infant wife before marriage was a bar of dowress see the case of Buckley vs Lowry 3 Bro. Par. Ca when it was decided to be a bar. Gould Parker & Pratt delivered their opinions that she was not barred, viewing a jointure as a contract & her being a minor she was not bound because as L^d Hardwicke declared a jointure was a provision hominis & not a contract. From the late decisions respecting jointures the point of light in which this subject is to be considered is this that a jointure is not in the nature of a contract between the parties, but is a provision by the husband for the wife. See Bac. & Hem. in Revis Dom. Rel. pp. 42. —

If it should turn out that the land settled as a jointure was holden by a defective title she is not bound by it but may resort to her dower. If part of the title is good & part bad she is entitled to a lien on her husbands lands in lieu of the bad part. & if the husbands father had agreed to settle the jointure she has a lien upon his lands also 1 Atk 440

She may view herself in this case either as a special creditor or she may commit waste to make up the deficiency Eq Ca Abg 241. 4 Bro Parl Ca. 604. 588.

To make a marriage settlement it need not be of real estate therefore marriage settlements cannot bar dower Co Lit 36. 4 Co. 3. Jointures are sometimes made after marriage. If she joins with her husband in the conveyance of such jointure she will not loose her dower. but if the conveyance so made had been of a jointure settled before marriage she would be barred of her dower & the reason of the distinction seems to be that she was sui juris in this latter case when she accepts of the jointure and having entered into the contract willingly therefore should be bound by her conveyance Dyer 338.

Suppose the husband sells the jointure made before marriage nothing passes. but if he sells that made after marriage it will hold because who knows that she will accept the jointure after his death in lieu of her dower Co Lit 37. 1 Dyer 358. all this goes to satisfy me that at an early period her contract was necessary in order to give validity to a jointure & that in early times a jointure must have arisen in contract & not by law

vision hominis — If jointure made after marriage & accepted by the wife on the death of her husband it will bar her dower at C.L. So too in case a jointure is made by devise. if she accepts of it. it will bar her of her dower. It is however in both cases at her election to accept or not. for she is under no obligation in this case at C.L. but may claim her dower. But she cannot have both jointure & dower. If therefore a man makes a will giving his wife a legacy in lieu of her dower or jointure she may accept the legacy or reject it. if she accepts she waives her dower or jointure 4 Bro. Par. Ca. 503. 2 P Wms 613. Now this I think goes to prove that formerly love consideration was absolutely necessary to make the jointure good. But suppose she accepts the legacy & there is a deficiency so that the other legacies cannot be paid. yet her legacy shall not abate 1 P Wms 127. Marriage is considered as good as the cash & she is in this case looked upon as the purchaser for a valuable consideration —

When there has been a voluntary settlement by a father on his daughter & he afterwards married & settled the same land on his wife as a jointure the wife was considered as entitled to the land because she was a purchaser for a valuable consideration: but the husband on his death devised land to his wife in lieu of the jointure land & she would not accept of it. Chancery decreed that the land so devised should go to the daughter 1 Vis 210. 1 Eq Ca 221. 176

It appears to have been settled formerly that whenever a will was made & a legacy given. it could not under any

circumstance be considered in lieu of dower unless it was clearly so expressed to be; & that in such case the wife would be entitled to both dower & legacy. But there have been different decisions lately & it seems now to be settled that where her taking both would defeat the other provisions in the will she will be entitled only to one — A legacy ought to be expressed in the will however to be in lieu of dower & generally it will have no such effects & the widow will be entitled to both dower & legacy 3 Atk 230. 4 Bro C. Ca. 36. In some of the states the practice has obtained of persons giving in their wills one third of their estate real & to their wives for life without mentioning that it is given in lieu of dower what construction may be given by the courts of our country in such a case may perhaps be uncertain. In London it has been the practice in such cases to give her both 1/3 part 1/3 and her dower Dom. Rel. 47. I take it to be a settled point that if you can come at a set of facts which will prove that he only intended her to have her dower those facts may be introduced as evidence notwithstanding the Statute of frauds & perjuries says no parol evidence can be introduced to prove the conveyance of land Co Litt 36. 3 B. & C. 254. 1 Dyer 230. Bac. Elig 38. L. Ray 435. 2 Br. & C. 483 & 503. 2 P Wms 613. No transaction of the husband respecting the land will affect her dower — Pre. Ch. 137.

With regard to the effect of a mortgage on the dower of the wife or title Mortgage — By C.L. the wife of a felon could not be endowed. this is however by Statute of Edw 6 altered in favour of such wives. The wife of a traitor however cannot be endowed.

Although dower is lost by attainder of treason yet a jointure is not. because it is vested before marriage & cannot be divested afterwards by any act of the husband. If the husband leases his land for life before marriage his wife shall not be endowed. for the lessee has the freehold & the husband was not seised during the coverture. But if he had leased it for years before marriage then she might have been endowed of the reversion. for in this case the possession of the tenant for years was the possession of him in remainder or reversion.

The wife is not entitled to dower out of a trust estate She is not entitled to dower out of an equity of redemption. This rule is founded more upon precedents than principle. Could not a wife be endowed of an equity of redemption in this country? 2 P.Wms 252. 2 Ch.Ca. 271. 1 Eq.Ab. 606.

It has been decided in two of the States that she might be endowed. —— A man devised his lands to pay his debts & then to his son in fee. but the son died before the debts were paid. the question was whether his wife could be endowed out of those lands that remained after the payment of the debts. The court decided in her favour for the devise was but a chattel interest & it was the same as if the devise had been made to the son charged with the payment of the debts Eq.Ca.Ab. 218. —— "When the husband sows his land & dies & the wife is endowed of that land. the emblements growing on it belong to her. This seems to contradict the general rules —— Dower is considered as a continuation of the seisin of the husband & the heir is now seised of that of which the widow is endowed. thus A.S. dies & his wife is endowed

of certain lands. the son of J. S. in whose his father lands & dies then the widow of J. S. dies now in such case the widow of J. S.'s son shall not be endowed out of the lands which J. S.'s widow had dower. because dower is a continuation of the seisin of the husband. & J. S.'s son was therefore seised of those lands during his life time. —

By C.L. if tenant in dower sould the land & died her Ex.rs was not intitled to the emblements but a Stat of Edw. 3 hes altred the law in favour of widows — By the Eng. law marriage within the levitical degrees cannot be impeached after consummated therefore if not impeached upon, the widow will be endowed 1 Roll 620. Co Lit 320. On the subject of dower see Rees dom. Rel. Pet. Bar. & Jenn — In some of the states such marriages as those just adverted to are absolutely void. of course the widow cannot be endowed In Con the widow is endowed of 1/3 of the land of which the husband died seised. — and conveyances by him in contemplation of death will not bar the dower they being considered as wills — see 2 Ves 431. 440. — In Mass also a woman is intitled to dower even in case of divorce a vinculo matrimonii if she is not the party in fault In Con. however remember that divorces are for unpermitted causes. In Con a woman does not forfeit her dower by the treason of the husband. —

III Estates by the curtesy of England —

A curtesy estate is that where a man marries a woman seised of lands of inheritance & has by her issue born alive which issue could have inherited the estate now upon the

death. the husband shall hold the lands during life as tenant by the curtesy of Eng. By the Eng. law the wife must have had title & seisin. but in most of the states seisin is not required & the effect of the martin question is done away with —

The husband is not entitled to curtesy in a trust estate. 2 Pow. 229. 1 Atk 607. 2 ib 47.

The husband is not entitled to curtesy out of that property which the wife holds to her sole & separate use 3 Atk 395 695.

Conventional Estates for Life. —

Conventional estates or estates created by the act of the parties are such as are given to a man by some instrument expressly for life — they are sometimes for the life of another person & sometimes for more lives than one — Any estate resting on a contingency which may last for life will be esteemed an estate for life & have its qualities but no estate for a determinate period can be a life estate nor possess its qualities —

A grant for life generally is for the life of the grantee. therefore if an estate be granted to B generally without adding any thing further. it will be considered as an estate for the life of B. because an estate for his own life is considered as more beneficial to him than if it be for the life of any other person. — But if tenant in tail grant an estate for life it is not an estate for the life of the grantee because this it is not in his power to give. therefore the effect will be the conveyance of as great an estate as tenant in tail can convey. which is an estate for his own life. — A life estate is also created without any words implying a conveyance for

any particular time. as when an estate is convey'd to B. by deed without saying any thing further this will vest in B. an estate for life. this arose from the idea that a life estate was the greatest that could be created. If an estate be given for life liable to end on the happening of some certain event this is an estate for life 1 Vent 346. This kind of estates are freehold interests - on this freehold estate you may limit a contingent remainder as when an estate is given for life remainder to B's eldest son unborn here the interest passes out of the grantor & the remainder is supported by the life estate. If the particular estate had been an estate for years this could not be done for an estate for years cannot support a contingent remainder. because otherwise the freehold might be in abeyance & an abeyance of the freehold is looked upon by the Law as a horrible thing. -

An estate pur autre vie being a freehold estate cannot go to Executors -

The Eng: principle that if tenant for life undertakes to convey a greater estate than he has it is a forfeiture of his estate, is not material in this country. The feudal idea upon which it was founded does not prevail here & such a sale will convey all the tenants interest - The incidents of a conventional estate for life are much the same as those of legal estates for life & have been before mentioned -

Doctrine of Emblements

There is a species of amphibious property sometimes real and

sometimes personal called emblements which may be defined to be any thing in the nature of a crop which is the annual production of labour - such things as are raised by the industry of the tenant. These emblements adhere to the freehold in the same manner as trees or grass and yet they are not always real property. they will pass by a grant of the freehold therefore in that point of view they are considered as real property.

Waste cannot be committed on them unless they are severed from the freehold in this point of view they are considered as real property. But in case of the death of the tenant they will not descend to the heir but go to the Ex.r & in this point of view they are considered as personal property.—

When tenant in fee simple or fee tail dies the emblements go to the Ex.r But what will become of them in case that the tenant for life dies? They will go to the Ex.r as assets in his hands - otherwise if the tenant for life, ~~or~~ not with standing his estate by his own act 6o dit 55. 1 Roll. 727. — If the grantor when he conveys the freehold intends to except the crops he ought to except them in the deed.— With regard to emblements many observations have been before made therefore it is unnecessary to say any thing more on the subject

Estates less than Freehold

1 Lease for years. — A lease for years is a contract for the possession of lands & tenements for some determinate period - This estate although had in lands is not real prop-

erty but a chattel interest. It goes to the Exr upon the death of the tenant as other chattels do & is applied to the same use although it may be more than ten times as valuable as a life estate which is a freehold. — If an estate is leased only for one month it is an estate for years as much as if it had been leased for 1000 years. — Every estate which may continue for life as an estate during coverture, widowhood &c is an estate for life. But what distinguishes leases for years from those estates is that the former begin at a determinate period of time & end at a determinate period of time Co. Lit. 45. Upon the principles of the C.L. an estate of freehold cannot be made to commence in future. whereas estates for years may be made to commence at any time —

In making a lease for years if no time is mentioned for its commencement it will commence from the delivery of the lease. Co. Lit 46. The words generally used in the creation of this estate are "demise" "lease" and "to farm let" but these terms are by no means necessary any words which will shew a certain intention in the lessor will convey just such an estate for years as is expressed or was intended. —

At C.L. it is said leases for years might be made by parol. but by 29 Car. 2 there can be no interest created by any parol agreement, except leases for 3 years on which there is reserved a rent of 2/3 of the improved value of the lands so leased. — If however a man does make a lease by parol & by consequence thereof a tenant enters it will not be void as to all persons, for it will be a license to save

him from an action of trespass. for his entry will be lawful.
Again if a pool lease is made with reservation of rent if entry in consequence thereof the rent shall be paid. but not on the ground of the lease being a good one & the tenant thereby acquiring an interest in the land. but on the ground of the tenants receiving profit or advantage for which he ought to pay.

Who can make leases? Tenant in fee simple can make a lease for any time he pleases because the whole property resides in him. — But a tenant in tail can make no lease that will be binding on his issue except by 31 Hen 8 which enables tenant in tail to lease for three lives in use which might last longer than his life & so long as it did last the issue would be bound thereby. Can tenant pur autre vie make a lease. I. Rawe supposes upon principle he may but he knows of no case directly mining the point. — This estate hath certain incidents. Lessee for years is liable for waste actual or permissive. if it is such as the law deems to be waste. But this lessee cannot be sued in Trespass because he came lawfully into possession — In the action for waste you recover treble damages & the thing wasted — Another incident is forfeiture If tenant conveys away a greater estate than he has himself — Our estate for years will support a vested remainder but not a contingent remainder: this is a positive rule. It differs from an estate for life in that it is personal estate & tenant for life has privileges which tenant for years has not. as a freeholder may vote &c

an estate for life can only be appraised off. until the debt is paid under ex. whereas an estate for years may be taken like other personal property & sold at the cost. — The husband of a wife who has an estate for life cannot sell it. if he does it will revert to her. but if she has an estate for years he may dispose of it at pleasure. In both these estates however the tenant is entitled to estovers as plough. fire. hay & house bote

No technical terms are necessary to convey an estate for years. Mon 861 or 681 Dob. 34. bro. P.C. 92. bro. law. 207 long leases have been made in our country as leases for 300 years & are considered as personal property but in law they are considered as fee simple estates and the widow may be endowed out them &c. — Although an estate pur autre vie is not included in the Stat. of wills. yet in the U. States it is included in devisable property in dispensation of the Stat 29 Car. 2. which makes it descend It has been determined in several of the States that it is devisable

Whenever an estate is uncertain it is an estate for life. but if it is reduced to certainty it is an estate for years. 2 Burr 1027. 1023. a lease from year to year is held to be an estate for years — 1 Wils. 262.

III Estates at Will. This is neither real nor personal property. It can neither be taken by execution or attachment. It is merely a license to enter on the land & time prove. It is at the will of both parties Landlord & tenant Co Litt 55. Mon 775. A parol lease is good for an estate at will and the tenant is no trespasser —

This estate may be determined in various ways. It may be determined by express words as an order that the lessee quits the premises. This notice must be given in a reasonable time when there is no stat. making regulations on the subject. The Eng. stat. enacts that 6 mos. notice shall be given Co. Lit. 55. In this country they have different stat. in different states. By the Eng. stat. if tenant held over after having a 6 mos. notice he may be treated as a trespasser. Any act done by the lessor which diminishes the enjoyment of the lessee estate. as ploughing up the land amounts to a determination of the estate 1 Roll 860.

The death of either party amounts to the determination of the estate. The lessee may put an end to it at any time he pleases by quiting the premises. Lessee may end it by committing waste for this makes him a trespasser. It is said that the first stroke he gives to a tree with his ax makes him a trespasser. Now it seems to me to be a matter of some nicety to determine how he can commit a trespass when he is lawfully in possession. If he had committed the act after the estate was determined he would then undoubtedly have been a trespasser. Co. Lit. 57.

The lessor may lease the land to commence at a future time without injuring this estate 1 Roll 860.

When the estate is determined by the lessor the lessee is entitled in express express to take away his emblements & property, but when it is determined by the act of the lessee himself he is only entitled to time to take away his property such as household furniture &c—

When the estate is determined by the lessor the emblements are the property of the lessee & he may maintain an action for them against lessor 1 Salk 413

If lessee is ordered off & will not go he is like any other person who unlawfully takes possession. & every act done by him after that time is a trespass. therefore he may be sued every week or day as a trespasser. for after the notice to quit he has no right to tarry any longer than a reasonable time for taking his things away. In Eng. you cannot recover in ejectment against him without previously giving him six months notice 6 mo Eliz 784 3 Wils. 25. — It is a common thing in this country to take land upon shares: now this is a distinct thing from an estate at will. for the lessor & lessee have a joint title: the possession is for a special purpose & the action must be brought in the name of the owner of the land who accounts in trust — (return to an action of trespass) The emblements in this estate belong to both

A license to enter & improve is always revocable & every act of ownership done by the lessee after revocation is a trespass 3 Wils. 25. As to the liability of lessee for his acts after the determination of the estate. or his acts by which he determines the estate see Eno. Eliz 784 & Lit 55.

What is to be paid by the lessee on the determination of the estate? If he has enjoyed the land for a year or over a fair rent. the courts have given the amount of the contract as evidence of the rent to be paid. but in case of a tenancy at will he pays no more than what the

enjoyment of his estate was reasonably worth in the opinion of the court.—

IIIII. Tenancy by Sufferance — This happens when lessee has had a legal estate & after the time has run out he stays there without any new license from the lessor — This is nearly allied to an estate at will. It is in fact an implied tenancy at will, an implied license to improve & the rule of rent is what the argument was before the legal estate run out: then is an implied argument to let the tenant keep possession & an implied argument to take the rent that was before given. Tenancy of mortgagor in possession is nothing more than a tenancy at will. but the doctrine with regard to this will come more appropriately under the head of mortgage which will be treated of hereafter

Estates upon Condition.

All the estates in real property that we have hitherto mentioned may be qualified or conditional as well as absolute. conditional estates have however the same quantities as if they were absolute. — an estate upon condition is one which depends upon some uncertain event by which it may be created enlarged or defeated. 6 co Litt 201. 2 Bl. 152

Estates upon condition are of two sorts I. Estates upon condition implied. II. Estates upon condition expressed under the last of these are ranked estates upon pledge I. Estates upon condition implied are such as have some condition annexed to them from the very spirit & nature of the thing itself: as the grant of an office which has an implied condition that it be faithfully performed. therefore

if not performed faithfully it will be defeated. So too thus is to every grant of an estate for life the implied condition that the tenant shall not undertake to enable an estate greater than his own. Co Litt 215. 2 Bl. Com. 153.—

All Estates upon condition expressed are such as have express qualifications annexed to them by which the estates are to commence, be enlarged or defeated. This express condition being annexed by the parties themselves Co. Litt. 201.

Express conditions are divided into conditions Precedent & conditions Subsequent. Precedent conditions are such as must actually happen before the estate can vest or be enlarged- as an estate granted to B upon his marriage with C. or provided he goes to York &c.—

These cannot apply to a freehold by deed because a freehold cannot be made to commence in future. They apply however to estates for years

Subsequent conditions are such as when the estate is vested but will be defeated on the happening of a certain event. as in the case of mortgage. So if I grant a farm of land to a man subject to the payment of rent this estate is liable to be defeated on the non payment of the rent

There is a material distinction between an express condition in deed. & a limitation or condition in law. When an estate from the nature of it cannot possibly remain or continue after the event takes place the qualification is called a limitation. so that in this case the estate is of such a nature as will finish of itself

if the condition is not performed & it is not necessary for the grantor to do any act in order to revest the estate. But if the qualification annexed is a condition in deed the estate does not cease immediately or of course after the happening of the condition - entry or claim is necessary by the grantor or his heirs to vest the estate & this is called a condition in deed. — The words of limitation are "so long" "while" & "until". The words "provided" "upon condition" "so that" are terms implying a condition in deed 2 Bl. 155 10 Co 41. 3 T.R 411. It is not however universally true that these last words imply conditions in deed, for it is a rule that when the estate is granted over to a third person or persons their very words will be considered as words of limitation, thus when an estate is granted to B "provided &c" & if he does not perform the condition then it is granted over to C. Now the word provided operates, not as a condition in deed but as a limitation, for otherwise the grantor might not enter & then C. would be deprived of his right 1 Vent 202. Co. Eliz 205 — It has lately been settled that an express condition that the lessee of a term shall not assign it is good 2 T.R 138. 8 T.R. 60. 1 2 Atk 219 If therefore he makes an assignment it is a forfeiture of the term.

But if a lease is made to A & his Executors with a condition that his Executors shall not assign, it is a question whether they may not assign without forfeiture of the estate — The better opinion seems to be that they may assign, such condition notwithstanding 2 T.R 140. 425.

If one holding an estate for life or years under a deed which is void attempts to assign under such ineffectual instrument, this attempt to assign will not destroy his estate 5 T R 621

It has been settled that if there is a lease made with a proviso that the term shall not be subject to Bankruptcy it will be good 8 T R 61. 2 T R 133. 6 T R 684 ---- It seems also that it may not be taken under an execution by the creditors of the lessee.

If an express condition subsequent annexed to an estate, be impossible at the time of its creation, it vests the estate in the grantee, for such condition is utterly void. The condition must however in such case be impossible in the nature of things. that is it impossible to all men, and then the estate becomes vested in the grantee — The rule is the same when the condition becomes impossible by the act of the grantor or the act of God Co Litt 206 201. 217. 2 Bl Com. 157. Powl Con 261. 2

So if the thing to be done is unlawful the estate becomes vested in the grantee. So when there is a condition attached, contrary & repugnant to the nature of the estate granted, the estate becomes vested in the grantee as when a fee simple is granted upon a condition never to sell —

The preceding cases refer to conditions subsequent but as to conditions precedent there is a material difference.

For in conditions precedent no title can possibly vest at all whether the condition be unlawful or impossible. If it is impossible it clearly cannot because the creation of the estate primarily depends upon the possibility of the condition happening. If it is unlawful the estate can never vest because the law can never recognise a title repugnant to the law itself — Co Lit 206 —

The performance of a condition either precedent or subsequent is matter in pais and of course provable by parol evidence Pawlett 54. Bennadiston. —

Under the head of conditions subsequent are included estates held in pledge or mortgage and living pledges which will next be considered. ———

If the condition is precedent the condition if impossible or unlawful the estate does never exist. — or if it is repugnant. —

Mortgage — substantially
An estate, real, pledged by a debtor to a creditor as a security for a debt. — Always prescribed and created by statute —

1st thing done is a conveyance of the land, liable to be defeated upon payment — the grantee is owner until the payment — the estate vests without deed but to pay. may be proved by parol. — If mortgage is in possession the mortgagor brings ejectment

If the payment is not made the grantee is the legal owner forever — the Ct of Chancery says — not — but if a man can make a contract. he must hold to it by

This known is the maxim that a contract may be voided if against sound policy — in the Ct of Chancery gave effect to a bargain notwithstanding above maxim, which a Ct of Law would not sanction. — a mortgage being a contract of this kind. — This court says, you may get master & until you get pay — but must not have $5000 for $100. — so far as against sound policy Chancery will interfere gives B a mortgage for 1 yr the money is not paid. — A has equity of redemption, which is real property can be conveyed, granted devised like all other property real —

B. has only personal property — will not pass under words to receipts in will & he has no other land & the mortgage construction would be against by palpable intention — It is a mere chose in action — which B. has

" to wife liable to be turned out. — or

" Then being no dower in an estate for years — at after the condition was broken & forfeiture — then your precise was by Com. Law — a Widow not dowable of an equity of Redemption / Brown 326. see / Atk 606 —

Husband may dispose of his wife's mortgages, but not of her equity of redemption

The mortgagee may bring ejectment & take rents & profits & account for them or may let it run on when he is sufficiently secure. —

The nature of this tenancy - it is a tenancy at will in one sense — but the mortgagor cannot have emblements — the mortgagor pays no rent — the mortgagee must sue in possession. & that is the reason why they got to chancery to ~~after to~~ adjust their accounts

There are certain differences between mortgages in fee & a mortgage for years — I shall devote a separate ~~to the~~ lecture to it itself — a mortgage for years was originally the only mortgage given — a mortgage in fee was known but not used for the mortgagee with like right of ejectment. Then a fee simple was changed into estate for years & then mortgagee the estate for years to prevent the mortgagor's wife being endowed in it —

In the U.S. Mortgages are almost universally of estate in fee & I shall proceed respecting mortgages of estate in fee. — The law gave the property entirely to the mortgagee after breach & forfeiture — but ~~the~~ Ch. interfered upon a principle that mortgages were opposed to sound policy & so far will relieve ag.st the — the way no deed of the contract — but that part which goes beyond sound policy will not be enforced —

As soon as the debt is created the mortgagee may take possession — but the mortgagor if he does, is liable to be dispossessed. It may be that payt will not be received if so a tender is sufficient to relieve the lien

Equity of Redemption is merely a creature of the court of equity — although the land is considered as the mortgagor's until the redemption, the mortgagee's interest continues in equity so far as to entitle him to the profits of course to the foreclosure (in equity) — A devise is affected by mortgage only pro tanto, & the law of devise makes any subsequent disposition fatal to a will. — Pow. Dev. 614. 618. 599. 3 Atk. 798. + 1 Atk. 606 — as to exception of appurtenant pasture land devised to A K

The money must be kept for the mortgagor when he calls for it. A gratuitous donation was secured by mortgage - the land being more valuable than the donation - the tender was refused and the whole liability was discharged. Lit Sec 335.

When the 6 Geo of 6 Hen first broached this doctrine it met on a contest in the Chancery as is always the case prevailed & has now the cognizance of this course & have established the doctrine that the mortgagee title it an end. except as trustee after payment. 1 Ves Sen 475 5 Pow. Mort. 14. 15

It will revert back the land & payment of money The debt is a personal contract and the principal the mortgage is only an accident. -

By an assignment of a bond the mortgage by which the bond is secured passes with it.

This equitable right, immediately after breach of the condition is called the Equity of redemption A Court of Law takes no notice of the equity of redemption - when the mortgagor dies the equity goes to the heir, If the owner devises to A & then mortgages the same land to B the devise is revoked even in equity upon presumption of the intention Dyer in Bl. 514. 6 Co R. 29.

The mortgagee interest continues so far as al- ways entitle the debt is paid to get possession - the right to get his money must never be in doubt

In Eng the common course is to hold 2 Mod 309 as mortgagee and apply the rents and profits in lieu of interest paid to the mortgagee. -

A mortgage cannot be a mortgage of an old one 1 Vern 192.

If it is agreed the mortgage shall be a good sale if the mortgagor advance additional sums of money at the time of making the mortgage, such agreement is void 1 Vern. 488. 38 2 Vern 520 — A man shall not have interest for his money on mortgage & no collateral advantage besides for the loan of it 2 Vern 521. or clog the redemption with any by-agreement

conditions precedent are construed strictly, those conditions subsequent, liberally

Every contract shewing a debt due & land pledged for its payment is a mortgage — 2 Ca Ab 595

The defeasance or condition is called a writing commonly on the back of the deed —

An incident of the mortgage is that there can be no contract made at the time of mortgaging that shall cut off the equity of redemption, for this reason that the borrower is often under circumstances of difficulty & thus it prevents relation — the maxim is that once a mortgage always a mortgage 1 Vern 33 1 Vern 170 1 Vent 362. Powl Mort. 19. 21. 28. 38.

It makes no difference whether the proviso is in the deed or not or in one or other instrument. As

It is a good contract if the mortgagor buys the right of redemption — sue it in time Powl 26. 27. 28

But by a subsequent agreement the mortgagee can purchase — by further advancements — but if evidence of fraud — it is void —

The mortgagor can convey by words shewing to the Mortgagee his right of redemption —

But to the general maxim of once a mortgage always &c — As in case of family settlements & when the party mortgages & never intends perhaps to redeem but to give his children the advantage of it the heir cannot enforce his right of redemption indeed any gratuitous settlement an exception —

This title of a mortgage is by deed but can be defeated by parol. —

No parol testimony is admitted to shew an agreement between Mo mortgagors that the weight is to lie on one of them only. — If lands are devised until certain specified sums are raised from them if the same cannot be raised without the lands may be mortgaged or sold, unless the devisor intention was plainly otherwise Prec in Ch. 394 2 Vern 310

According to the rules observed in Eq Cha Courts an absolute deed without any defeazance may be considered as a mortgage where circumstances endorse belief that equity of redemption was reserved — as when grantee remains in possession pays taxes but not int Our Sup. Courts have thrice decided twice and Judge J. thirty years, although the Ct. of errors as often reversed the decision so it remains in doubt. Dow. 65. Tal. Ch. 60. Pr. Ch. 526. 3 Moore 229.

"No tenant shall or permitted to set up the title of the mortgagee in any pleadings brought by the gor. + No tenant shall be permitted after paying rent + would use such to set up a superior title of a third person ag.t his lessor

"It is an estate which may be divisible

as when he made [illegible] to obtain security — Parol testimony is admitted to prove it

As soon as the mortgage is executed the mortgagee may enter — but if the mortgagor stays by agreement he is tenant at will to Mortgagee Powl 66.67 6 vo St. 659.

The Mortgagor may be turned out at any time & all the emblements go to the mortgagee & if there is not good security without waste may commit waste — 1 w Doug. 21. 6 vo St. 659. 1 Atk. 606. Powl. 68 Doug 266. — The mortgagor loses nothing for the whole must be accounted for — he may lease the land & the lease is good between the lessor & lessee & as against strangers & the lessee may redeem if he pleases — but if Mortgagee says this lease shall not stand. the lease is defeated & the lessee becomes a trespasser — or the lessee may be obliged to pay the rent to the mortgagee if he has not already paid it to the Mortgagor & Mortgagee may treat the tenant as his own tenant or as wrong doer — Powl Mort. 68. 80. Doug 22 266. 1 Atk. 606. The proceedings were all right even tho the mortgagor interfered. — The mortgagor can never set up title in any one else to defeat a suit begun by mortgagee 1 Ld Raym 760. 7 T. R 480. Powl. 470 1 Vern 258. 2 Bl. 298 vs. 308.

The mortgagor being the true owner, the right of Mortgagee is a mere chattle interest as security for payment but the Mortgagee's interest differs from a real freehold only in this that after forfeiture it cannot be recovered at law —

1st Before forfeiture the mortgagor being in possession as is usually the case — (indeed universally) 2d After forfeiture & before mortgagee enters — 3d After his entry & before foreclosure 4th After foreclosure & which by & by

B. I. 6 The mortgagor cannot, to better his security, do any act to encumber the estate mortgaged, which will be valid against the mortgagor after redemption. 3 Atk. 518. 723.

Equity of redemption will give a man a settlement where real property is required to give that.— Powl. 78. Statu Westm. c. 25 A person under the words lands tenements and hereditaments —— Powl 106. 2 Vesey 804. 2 Bro P.C. 8 Powl 170. Doug. 610. 2 Atk 294. 3 Pun Wms 341

The the mortgagor is real owner of the land the 6th of 6 Ann will grant an injunction to prevent waste because waste may lessen the security 3 Atk 723 Powl. 75.

The Mortgagees Interest—

The interest of the mortgagee to the premises is divided into four sums ± after the condition is broken what is his interest until the foreclosure? The whole of this business is arranged by the Court of Chancery tho' considered only as chattel Interest. Doug. 610. Powl 170. 2 Vern 621 1 Atk 605. If mortgagee should die, his interest will go to his representatives not to his heirs & payment must be made to him Ex.— A devise carries this Interest.

Powl 358. 453. 1 Pun Wms 458. 1 Eq. Ca Abr 326

The mortgagee must not incumber the Mortgagors estate B.— cannot commit waste without his security is defective precaution 2 Ver. 392. 3 Atk 723. if he does must account— If mortgagee enters, to take possession he must if necessity requires repair the mortgaged premises & charge the mortgagor & entrance on them.— this must be reasonable & necessary commonly called betterments— this charge goes on interest - with the principal debt. 3 Atk 518 2 Vern. 84

If a mortgage is made of an estate to which the mortgagor had no title - if he buys over the first deed to Mortgagee is good - this is called a graft upon the old stock. - If a mortgagee is attacked in his title the defence is at the expence of Mortgagor 2 Atk 518

The mortgagee takes the estate subject to the same incidents as it was in the hands of the Mortgagor — if he takes possession - if he does not he is not liable for the covenants which run with the Land - 2 Vern 275. 374. Doug 4 88. 444. Pow. 85. 92. in case of a term for years assd by way of mortgage - This principle of Law is established. That an assignee of a ~~Lease~~ lease is subject to the covenants in the original lease Powl. 86. 87. Shanks & Smith et al. 2 Vern 275

Of the Equity of Redemption

The right of redemption is whom does it belong —

The first person entitled to do this is the Mortgagor. The mortgage is considered as a trust and will remain so until foreclosure or redemption. 2 Atk. 526. Vern 615 — The mortgagor may redeem within any reasonable time and may be obliged to pay more or less according to who held the possession the rents & improvements

Any person may redeem who holds under the mortgagor as a conveyance might have been made by him —

a voluntary conveyance is always fraudulent as against a bona fide purchaser — If a man conveys away by way of settlement & afterwards mortgages it to

H. The law once was that none but those directly interested could redeem.

The youngest creditor may at C.L. redeem after he has sued out execution which gives him the lien. Pow. 109. 110

In bon. a judg.r cred.r in order to redeem must levy upon the equity

conveyance is bad — The purchaser or mortgagee holds it as mortgage against redemption —

Lands are often mortgaged several times over — The mortgagor may not think of redeeming and the subsequent mortgagees may redeem and they will hold the land as a mortgage in these lands, it is not tying the equity of redemption — It always remains a mortgage —

The assignee of Bankrupt or insolvent debtor may redeem — Any body that has a contingential interest in the land may redeem * & after him who holds it as a mortgage agt the mortgagor —

Much now the purchaser of the equity of redemption 2 Ch Ca 526. 1 Ch Ca 66. 1 Eq. Ca Abr. 316. Pow. 108. 162. Ca. 71. Dang. 22. 2 Vern 302. So also the heir of the mortgagor —

After mortgagor dealt the equity of Redemption descends to his heir & descends by the same rules as other real estate — the devisee and a judgement creditor may redeem — they have a lien upon the land Powl 109. 111 2 Bur. 978. 3 Ch Ca 200. 1 Vern 392. 2 Ch Ca 240. Co. Litt 102

In some states the creditor may bring his execution upon the land for state due from the mortgagor & then he may redeem & is in the situation of a second mortgagee — & has an interest in the land — this is however considered in the English law — Where the law is made what is to be done? — write your opinion off?

"Tenant by Elegit. Stat. Mercb. or Stat. Staple may redeem 2 Vern. 100.
A Guardian may apply rents & profits to redemption. 2. Ch. 137.

A Mortgagee requires she must redeem the whole

See 1 Vern 191—

B & may redeem — the wife must have been sued that ye have rec^d. rents & profits — 1 Ves. 298. 307. Qu. will no other wise in do?
A mortgagor after means of equity may redeem if to be proved to have been done on mesne trust — 2 Vern. 119. 164/6 n. 107

The acct of the former creditor or mortgagor is to be settled.— in proceeding how shall we deal with the lands Now must will set off It must be appraised & under the incumbrance any ch. but this settlement is too great for any but the creditors to manage —

But the plain path is appraise the whole to him and he holds it as mortgagee after the first mortgagee. it is nothing but a security for the debt.— I consider that wherever a creditor takes security of land he takes the whole of the land which may be redeemed in the usual way this is not an absolute sale of the Eq. of R. After the death of the mortgagor the widow may be in such circumstances as not to be able to get down without redemption. as where the mortgage was made before marriage & may redeem it. 1 Vern 191

So in the case where the has a portion on the mortgaged premises she may take an account & redeem it & she & wife hold it — credit what she advances over & above rents & profits. Pow. 112 1 Vern. 33. 193. 1 Eq. Cas. Abr. 219 The husband is entitled to curtesy 3. after the death of the wife Cowp. 112. 1 Atk. 103. In all these circumstances it remains a mortgage with redemption by some of those who have power to redeem as above stated —

When it comes into those hands who hold the legal & the equitable title this is an end of redemption — There is a case if a mortgagor alienes his equity of redemption to the mortgagee unless it be done in writing it is void —

It happens that are different interests in the estate One may own an estate for life another in fee if they agree amicably to redeem the owner for life must pay one third & the other two thirds — Pre. Ch. 62.

remainder man or reversioner

"Two thirds of improvements also — but no interest — for tenant for life is to keep down interest

A Tenant for life may be compelled by a quia timet to contribute upon the contingency arising upon which [illegible] is to be made Pow. 121. 442.3

this is to make him keep interest down & he may be obliged thereby to quit — or buy the remainder man or reversioner buying in the annuity

page — 2 Eq. Ca. Abr. 596 Pow. 121. 442

If tenant for life redeems he will hold against the owner in fee until the latter pays two thirds of principal & Prec. Ch. 62. Powl. 120.

If the mortgagee does not move & the tenant for life wont go forward & the remainder man redeems he may take possession under the mortgagees title until the tenant for life will pay one third —

2 Eq. Ca. Ab. 596. 2 Bro. 121. &c.

Application is made for redemption of the tenant in Fee calls upon him he has enjoyed the estate during his life. he has kept the interest down & paid that only. If an application is made to compel the representatives to pay the 6th of Ch. Ch. will order what is right & the remainder man will in this case have to pay more than 2/3. " 1 Vern 404. as 2/3 of lasting in proportion & now as the rule of changes is superseded by the draft of tenant for life 1 Vern 404

& if tenant for life & redeems he holds until the remainder man pays 2/3. if the remainder man redeems, the tenant for life must pay 1/3. but with this redeemed & the tenant dies then his estate was not as long as usual. his representatives would only have to allow for time he survived it. — 1 Vern 404 —

This equity of redemption is not at all at law. D. is not so liable as bound which see recurs to the him — an application is to be made to Ch. Ch. who determine that if the him or devisee will not pay the equity must be sold. — whenever you are obliged to go to Ch. Ch. The debts are to stand equally - that is they are equitable assets —

2 Atk 294. 2 Vern 61

1 Vern 410. 11 Mod. Rep. 1 Wms 341.

Mem in Engd the rules of assets as assignments in mortgage chattels & in fee.
In Com. the equity may be attached or levied upon -
In Engd and the mortgagor remains in possession as a mortgaged term for years would be assets at law - & with attached redemption
1 Vern 240. 2 Salk 354. this is real assets in hands of the heir
The remainder of a chatt. Inst. upon determination of a mortgage of part of the estate is assets pro tanto in Ex. hands
The Judg. in these cases wilde &c. Quando accidunt - assets -

When assets are equitable tho. there is no priority of creditor yet the second mortgagee is preferred for he has a lien upon the land 1 Vern 101 -

A. The person suing to redeem must shew his title to the equity 1 Vern 182
If the one preferred of the executors, any one directly or consequentially in trusts may redeem

B. a mortgagee heir who holds the equity may redeem before the creditor 2 Vent 350 -

If the [illegible] sells it to a bona fide purchaser he will be liable in 6 2/3 for the money although the land is not — same with the money but mortgagees entitled to be paid pro rata 2 Bl. 511. All equity of redemption are real assets liable to us in bon. & a devise given by Ex^r conveys the title —

It is advisable like any estate and for payt of debts & 8 Wm 3 12 & 1 Geo 2 50. assets are law equitable & the payments must be made pari passu. unless the devisee to Ex^r 1 Vern 63. 101. 1 Mod. 117. 1 Eq Ca Abr. 371. Suppose real property is sold for payt of debts must it be treated as equitable assets. — or not

If the mortgagor is willing to sell with a bona fide view by 6 2/3 the land or purchase money is still equitable assets

The rule is generally this if you might be obliged to go to 6 2/3 1 Eq Ca Abr 371. 1 Vern 63. 101. 1 Mod 117.

Can there be a prospective fruition of an equity of redemption?

The person to inherit must be the heir of the person last seised i.e. next a sisi as the thing is capable of and in case of an equity there must be an abandonment to deny sisin — i.e. the heir of the title will be said to be seised unless he does something which amounts to an abandonment — See Powl. 132. 1 Atk 604. 5. 8 T.R 213. — in last you will a definition of the Term prospective fruition —

A. to person person is entitled to redeem who has not an interest in the equity of redemption all that is to be understood by this is that no person may interfere upon one that has a lien upon the land, If such an one will redeem Eq Ca Abr 605. 1 Vern 182 Powl. 133. When a mortgagor becomes a bankrupt the legal estate is in his assignees & an equity of (2 Vent 350 the creditors will not suffer them to redeem the mortgagor may file a bill for redemption. B

The mortgagee cannot compel the mortgagor to redeem before the day of payment but in case of sudden rise in value of the property mortgaged he may be permitted to redeem 1 Vern 183—

Two Mortgages one worth redeeming, the other not. the heir shall not redeem the one without the other 1 Vern. 29. 245. neither shall mortgagor.—

A mortgages to B. for $1000 who sells to C. for $800. A comes to redeem from C. he must pay $1000. — A mortgages to B & then to C. & B. sells for $800 to D. & C comes to redeem from D he pays only $800 — so if C. a creditor of A comes to redeem he pays $850 — A mortgages to B for $1000 then to C & dies. his heir D buys in of B. for 800 & C. comes to redeem he pays the heir $800 — Same rule as to creditors & legatees. —

This equity is a creature of the Ct of Chancery and make subservient to their purposes and will suffer no man to redeem without doing equity in accordance to the gent rule that he who seeks, must do equity — Cowp 601 as when a Mortgagor stood trial on th ejectment that the claim was paid & made great cost the Court obliged him to pay it all before redemp. 2 Vern 526. So the right of redemption is not absolute — So if Mortgagee had taken possession & the mortgagor had afterwards ousted him of the possession the Ct obliged him to restore it 2 Eq Cas Ab 599 see also 2 Vern 526. If the heir of the mortgagor come to redeem he must redeem the bond debt See 1 Vern 245. Pow 140. The mortgagor must in all cases do equity before the Ct will grant relief. A purchaser under the mortgagee although he bought it for less money than the mortgage debt was owed, but when the incumbrances are examined as subsequent incumbrances the purchaser shall hold it against the subsequent incumbrancer as a creditor of the mortgagor only to what he gave for it. — So if one his executors trustees or agents buys in an incumbrance for less than its value the creditors & legatees are to have the benefit 1 Vern 476. 1 Salk 155 2 Vern 353. 1 Vern Eq. 336. 1 Eq Ca Ab 331 2 Eq Ca 54.

This rule applies to assets generally as well as to mortgage. —

There does not appear to be perfect equity in these rules

For if the mortgagors heir buying the incumbrance to protect one of his own being interested as creditor he shall be allowed all that is due on it, tho' he bought it for less. — 1 Vern Eq. Pow. 143.

* What distinction is there in principle between this and the case of ordinary purchasor, except so far as it goes to protect his own incumbrance? says Mr. Gould — Pow. 143. 1 Vern 49.

It is a general principle in chan. that a change of the relation between the parties as to being Plff or Deft is a change in equity. i.e. the Court proceed in some measure by the facts - who brot the bill. —

A purchasor of the equity is not bound to pay any debts except the actual incumbrancers — Pu. 61. 89. 571. 2 Chan. 1107. 1 Ves. 87 2 Ves. 662 —

* For simple contract debts will not bind real asets in the hands of the heir — If the mortgage is of a lease for years. and simple contract debts contracted beside the mortgage debt Mr Gould thinks the Ex must pay both - for a lease is personal & of course liable for debts on simple contracts —

I.E. if prior incumbrancer holds a bond it will be postponed to all real incumbrancers either by mortgages, judgement or statute — Pow. 145.

Although the money due on bond was time before the mortgage yet the equity of its payment before redemption by mortgagor or his heirs remains to same Pow. 146. —

tho not having paid the whole equitable consideration why should he hold as against a bonafide creditor? 1 Pow 145 / Vern 49

A Mortgagor becomes indebted more than the mortgage debt the Ct will oblige him to pay it before they suffer him to redeem 1 Vern. 244

If the mortgagee comes to foreclose the Ct will not oblige the mortgagor in the above case to pay the other debts not secured in the mortgage 1 Vern 41. 244. 2 Eq Ca Abg 601 — Pow. 143. 511.

The mortgagor's heir is in the same situation only not obliged to pay any debts but those which descend to him bonds &c not those which it is the Ex^rs duty to pay 1 P. Wms. 775 1 Vern 187 1 Vern 245 — If more mortgages than one & the first has a bond debt & one of the incumbrancers comes to redeem he is not obliged like Mortgagor to pay the bond debt — 13 Rep. 52 3 Salk 240. 84 3 Ath 556.

at C.L. the Devisee of the equity was not obliged to pay the bond debts but by stat he is in the hand is to pay it. — Pow. 145. 6. Pa 62. 511. Whatever debts the heir is bound to pay, he must pay before redemption and no others

If a purchaser of a mortgage has a bond debt of his own agt the mortgagor he is intitled precisely to the same equity as the mortgagee — Pow 145. ——

If the debt is usually greater than the bond the bond must be paid in full notwithstanding that the debt & interest is double the bond. the Ct never alters contracts — that is if the mortgagor applies to redem-

By Eng. Stat 4 & 5 W & M. cap 16. the equity is taken away from the mortgagor if he disparages the mortgagee by encumbering the prior incumbrances. —

* For the purchaser is bound only for actual incumbrances —

No length of time will bar when it is agreed that the mortgagee shall hold on title he is paid by rents & profits. 1 Vern 418. Powl. 156

any act of mortgagee which recognises the mortgagors right to redeem within the 20 yrs (or 15) will prevent this law. Those disabilities must have existed at the time the equity began i.e. at forfeiture 2 Vern 418. 1 Eq Ca Ab. 315. 3 Atk 333.

Suppose in this case the mortgagee attempts to foreclose. he must take up with the amount of the bond. Pow. 146. 3 Atk. 518. There are cases where the first mortgagee will be postponed to the second as when the first practises fraud by misrepresenting to the second the state of the title — here the second may redeem before the first — Pa 6b 181. So where the second debt is secured or defective title the first debt secured serves the last. — If he is privy to the second mortgage and it does not give notice in writing it is fraud, A mortgagor gets rid of the lien upon his land by bonâ debts by selling his equity.

Price 62. 89. 511. 2 Eca 1107. 1 Ves. 87. 2 Ves 662

Mortgages, bonds debts are secured only by the mortgagor and his assets —

Length of possession sometimes bars right of redemption in mortgagor — for it furnishes presumptive evidence that the business has been settled but this presumption may be rebutted like all other presumptions — but if mortgagor has been in possession for the time limited (20 yrs in Eng. 15 yrs in Con.) after forfeiture it destroys the presumption in this case time is no bar. Perhaps it may appear there has been a payment on the bonds, a settlement between the parties a petition brot & stopped — absence of either party — a device by the mortgagee these appear strongly against the presumption — 2 Eq Ca Abr 596. 2 Atk. 339. 2 Ves 418 Pow. 144 — Where any disability as absence. infancy &c the same time is allowed as established a right of entry, viz 5 years in Con.

Pow 150. 160. 3 Pow 287

If any fraud has been practised upon the mortgagor to prevent his redeeming no length of time will prevent him. — Powell 157 — If the land is not worth as much as the money secured upon it at the time of mortgage & the mortgagee taking possession & improved until it became very valuable

Does sickness inability poverty take the mortgage out of the stat of limitation & the mortgagee wards bring able by reason transition — our books state the time, omitted of the redemption there are no cases in point & I doubt the property of the judgement —

Which mortgages are such as never fix a time for the payment & always redeemable, & as there is no forfeiture there is no equity — If mortgagee submits to be redeemed no time will bar a decree 2 Eq Cas Abr 185. Powell 160.

The rule respecting redemption of the second mortgagee is grounded on the presumption of an understanding between the mortgagor & first mortgagee —

A second mortgage of the same subject is a mortgage of the land itself & not of the equity if it were the second mortgage would always have to be redeemed first. This is a material distinction —

Mortgaged premises devised by mortgagee —

The Mortgagees interest is devisable like the mortgagors & the devisee is in place of mortgagee 1 Cha Rep 33

Some old authorities decided Mortgagees interest to be real property — the wife would be endowed — and devised under all "my mortgages"

A. will the mortgagee in fee the same as where it is in the trust will not pass under those words of "immediately" through the equity of redemption is afterwards foreclosed or released.
N. B. A codicil relating to personal property is not sufficient republication to pass lands purchased after the [illegible] 2 Vernon 625

the Devisee would have had an estate for life only 6 vin Abr. 447 449. 450. but this is now stepped away — by devise of all my mortgages will pass all his interest in the mortgages — it being considered now only as a chattel. — 2 Bun 978. All his interest will pass under Lands tenements & hereditaments they being words expressive of real estate (a) — 2 Vern 625. 1 Vn 3d 2 Vent 351. this however is not true if the mortgagee had no other title to any Lands. 2 Eq. Ca. Abr. 606. B. & Ca. R. 257.

Foreclosure obtained agt the mortgagor by the Devisee or by contest with mortgagor or his Heir 16 Ca. 318. It is said by some that when the money due on a mortgage is devised that it does not carry the interest as if I owe a bond of $500 principal secured by mortgage he devises the debt or bond the whole of it — we should suppose he meant to devise the interest now accruing. but 2 Atk 113 says not, which gives Question lately made whether a mortgagee's interest will pass by devise without there words — Cowth 79. 81. 35. 2 Bur. 978. 3 Mod 260. there is no doubt but it will —

If Tacking — subsequent incumbrancer — the a prior one. — The last mortgagee by securing the first mortgage secures his own debt before the second — Whoever has the legal title will secure his own debt by tacking them together — for the first has the legal the subsequent mortgagee only equitable title

In England incumbrances stand upon the same footing in order of time as Statute, judgments & recognizances In Con. we have no stat which interferes and these do not incumber - but with us it is most true that prior in time pow potior est in jure -
B. authorities 1 Vis. 360. 1 P.W. 280. 1 T. R 755. 1 Vern 187.

In this there must be purchase taking for if one has superior equitable title he will hold it in spite of any other —

In some States all deeds in some all mortgages are recorded — this is not recording sufficient notice? — a man that may have notice shall be supposed to have it in equity — and in those states its recording is constructive notice this can be no taking —

In four Counties in Engd deeds are recorded and recording is not constructive notice — some of our States have determined otherways where all have the doctrine of taking is done away — see 1 Bro. Par. Ca. 66. Powr. 181 2 Vern 524. 1 Eq Ca Abd 142. 2 Ves. 477. where the title equal according to the date of the deed every man is entitled to his debt 2 Ves. 570. 1 Ves Sen 240.

B — Priority is lost sometimes and first by fraud as concealing his mortgage when inquired of. second when the prior mortgagee has been guilty of great neglect as not taking up the title deeds. — particularly where no recording is practised — they are not commonly taken up unless for future — If 1 Ves. 6 the first mortgagee was witness to the second mortgage and he was postponed by it — but by later decision witnessing is not proof that he knew the contents of it —

This privilege of racking L.d Hale called tabula in naufragia 2 Vern 279.

B. such knowledge after money lent will not exclude the priority

C. of 60 acrs. 20 are mortgaged to A. the whole to B & afterwards the whole to C. & afterwards C purchases in the first mortgage. that shall not protect more than the 20 acres but it shall protect those 20 acres so as B. shall never recover that until he pays C. all the money upon the first and last mortgage - 2 Vern 339. — It is to be understood that B can in this case redeem the 40 acrs. if he pleases separately. but the 20 C. purchased cannot be redeemed without the 40.

In short any circumstances which shew fraud or deception in first mortgagee will destroy his priority—
1 Ves. 6. 1 Vern 136. 2 Vern 337. 1 Vern 370. 2 [illegible]
1 P. Wms 393. 1 Brown 62 957. 1 Ves. 360. 3 P Wms 280—
1 J R 755. 763. 2 Vern 554. the last quotation is a strong case of fraud—

If the inquiries gives good reason to suspect, that he is about to lend money to mortgagor, the first must answer,— & mortgagee loses his priority by a subsequent mortgagee buying in over his head if the equitable titles are equal—

If the subsequent mortgagee knew there were other mortgagees & lent his money on such knowledge he cannot take 2 Ves. 574. 1 Vern 187. Prec 62. 256. i.e. he shall have no priority!

B. The subsequent mortgagee may take also to a judgments or to any prior incumbrance & thus gain priority 1 Ves. 497 If the prior incumbrancer purchased in they are secured for as much as the prior mortgage covers see the 8th under title 6 opposite page—

2 Vent 339. Sir Thos first incumbrancer covers upon the subsequent mortgagee buying, shall hold for all his expenditures in purchase 1 P Wms 495
1 J R 773. 1 Eq Ca Abg 323. Pow. 272.

A satisfied incumbrance is a strange thing to be found in equity— the bond is paid up after the title is lost.— & loan will never back the title at once.— satisfied incumbrance carries the legal title 1 Vern 187 which the incumbrancer may secure by purchase—

[a] 2 Vs. 204. 2 Eq. Ca. Abr. 592. 7 Viner 54. — Or if a recognizance hath not been inrolled in proper time, or in case of a judgt it has not been docketed &c — In and the subsequent incumbrancer can gain no priority, except by purchasing in the legal estate. for there is no such thing as tacking an equity to any incumbrance, but that which carries the legal estate along with it 1 P. W. 495 1 P. R 773. —

[a] 2 Eq. Ca. Abr. 2 P. W. 491. 2 Vs. 662. Pr. Ch. 494. 310. 1 Eq. Ca. Abr. 325. 2 Atk. 347

[b] If a prior mortgagee make a loan subsequent & without knowledge of the after mortgage & take judgment for security he may tack it to his mortgage — the Court goes upon the ground that the after loan was made upon the faith of the original security 2 Atk. 352 See also — Pow. 230. 2 P. W. 494 Pr. Ch. 226. 2 Eq. Ca. 594 2 Vs 662. 224 —

If the third incumbrancer applied the title would be decreed to the mortgagor & it would vest direct by in the subsequent or third incumbrancer 1 Eq Ca Ab 322 2 Vern 279.330. 2 Ves. 157 1 Ves 52. Pow 215

When the prior incumbrance purchased in is defective it gives no priority, no legal title 1 P Wms 240. Pow. 215 No other incumbrancer can take title a mortgagee being one who has a specific lien upon the land. 2 P. Wms 491 2 Ves 662 1 Eq Ca Ab 355. 2 Atk 347. The mortgagee however must be foreclosed before it is purchased or title will not take — a Judgt creditor or State debt cannot take for their lien is gained not specific, A subsequent incumbrancer may take even after debt to his prior mortgagee if he has no knowledge of intermediate mortgage. Pow. 229. 2 P. Wms. 494. 2 Atk 352. 2 Ves. 663. 1 Eq Ca Ab 319.

A defective mortgage may be enforced agt creditors who have no specific lien upon the land — Cham. with treats it as security —

When intervening incumbrance is defective the subsequent incumbrancer may, knowing of the intervening ones, take and then be secure agt them — for every one must take care of his own concerns — and if the one security goes over the claim yours is secured by his destruction — I've said a man must love himself rather better than he does his neighbor — Reason of this rule is, that a mortgage defective does not carry the legal estate —

The creditor having a general notice of the title himself on the land at the time originally taking the land for security

* This clause will be good security although at the time of the creation of this after-debt the first-mortgagee had knowledge of the after-mortgages, provided the after-mortgagees knew of this clause in the original mortgage — 7 Vin. 52. Pow. 236. 285.

(b) When notice is charged by one party and it is not positively, directly & absolutely denied it will be deemed confessed. Pow. 6th 226. 2 Vent 361. 2 Ves. 450. 3 P.W. 243 2 Eq. Ca. 73. Pow. 253. So two witnesses against one against circumstances amounting to two. 1 Ves 56. 95. P. 6th 19. Pow. 254. i.e. if the denial of facts are equally strong with the deposition —

If the first mortgage is defective and the after mortgagee knows it & lends subscribing on this deed the will be secure because this is no harm to the first mortgagee — but this defective mortgage will be good agt creditors & and the mortgagor, but not agt subsequent mortgagees 1 Eq C. 320 Sow 215. 232. 234 1 Pa W. 491. 2 Van 534. 1 Sal. 449 3 Bac 643. 4 Suppose the mortgage deed contains a clause securing subsequent debts — this will be good for those debts but if the second or third mortgagee knew nothing of this they would not be obliged to pay those subsequent debts. although with respect to mortgagor they are considered part of the mortgage debt & If on trial it can be shewn that a second or third mortgagee had notice by only one witness the mortgagee swearing he had not notice the bill will be dismissed — Powl 254 for it is oath agt oath. (b) If in 6th of 62 a. the Plff states not only generally as to the notice given but also states particulars respecting it, the mortgagee must answer the statements particularly — and the Courts may examine upon interrogatories it. — If he has doubts concerning it, 2 Vis 450. Pow 254. 5. 1 Vis 97. 2 Atk 19. 141. 6 Ves 52. ——

* In which case if the mortgagor pays before forfeiture he has his election of the persons to whom it is payable — Barnard 50.

(a) and the payment ought to merit to the fund from which it was taken Pow. 299.

A bequest of a specific legacy to the Ex^r does not bar his right to the money for he holds merely as trustee in entire droit
2 Cha. Ca 187. 1 Vern 412. Pow. 302.3

Notice express & implied

Notice is of two kinds express or actual & constructive or implied

After foreclosure

To whom belongs Interest of mortgagee upon the death of the gee

The law formerly was that the Inst was to be paid to the heir of the mortgagee, i.e. the money — but now a mortgage is considered a chattel for every purpose but one to get possession & the money must be paid to Executor except when the contract directs it payment to the heir, but the money is the property of the Ex. 1 Eq Ca Ab. 326 1 Vern 170. There is no case in which the heir can have any benefit except he goes forward and pays up all demands when he will hold the legal title.

We have two funds to pay debts personal in Ex. hands & real in the hands of the heir, the money lent on mortgage was one personal property and it was not intended to purchase land.

Whenever the equity is purchased or the mortgage is foreclosed it goes to the Heir. 2 Vent 348 Hard 267. 1 Chan Ca 283. Pow. 299. 301.

Suppose the mortgagor pays it to the Ex. by the day the heir will convey or be compelled to reconvey the security. That the heir must pay over the money to the Ex. if pd to him Pow 302. 2 Vent 348. 351. If to Ex. it must be paid to Admr. but if the money is not paid by the mortgagor the heir of mortgagee must convey it to Admr, even if there are no debts due from the estate, to be distributed as chattels, 1 Vern 170. Eq Ca. Ab 328.

(a) But the whole estate does not go to the representatives as Powell incorrectly says.—

(b) cuthb. 2 Vern 193. 1 Vern 4. 170. and even if the equity had run out by Stat of limitations - if the mortgagee had not taken possession it would still be personal & go to Ex.ors

(b) For equity considers that done which ought to be done.—

Sub[illegible] on the mortgagor releases the equity to the heir. the personal representatives will have the gross Interest 2 Vern 193 1 Vern 4. 170 (a) So if the mortgage is foreclosed the personal representatives will be entitled to the money

If the mortgagee had taken possession it would have descended to the heir if there had been a foreclosure (b) A mortgages to B. B sells to C - A may redeem from C. but if C dies in possession the land as real estate, descends to his heir for he bought it as real property 1 Vern 271. and evidently considered it such. - If mortgagee devises the land as real property the devisee takes it as real property which goes to his heir 2 Bur 969. 2 Vern 581 Pr Cha 265.

The mortgagee interlineas has no effect upon mortgagor in any claim and vice versa. but merely upon the mortgagees representatives. If money secured by mortgage is directed to be laid out in lands & settled in any particular manner it is bound by the articles and goes as the land would have gone if purchased with the money 3 P Wms 217. (b)

When joint tenancy prevails the case of mortgagees is different - Thus joint mortgagees are not joint personal chattels - the jus accrescendi does not take place they are tenants in common after foreclosure - 2 Ves 258. 1 Atk 467 2 Atk 55. 3 Atk 733, 1 Ves 15. 3 P Wms 258

Of the Instrument of mortgagors wife in the mortgaged premises - When a man would dispose of his lands his wife must join if he would bar her dower -

(a) but if the mortgage is made by husband alone. the right of dower is paramount to that of mortgagee —

(b) this rule holds only (says Powell) when a jointure is made by the husband after the land is mortgaged. ie the mortgage is prior to the jointure but it does not hold when the jointure is in articles executory it is not executed by deeds of settlement — and if after such executory jointure the husband mortgage to one without notice she has — the right of redemption — 2 Vern 323. 1 Vern 191. Bro. 317. 1 Eq. Ca. abr. 316. and she will hold for her life and her Exr should hold until the money was raised which she laid out upon the redemption. 2 Vern. 323. — Pow. 314,

(c) A settlement of mortgaged premises, made after marriage. if merely voluntary, is void against a second mortgagee although he hath notice thereof Pow. 315. see also 2 P.Wms 365. 6.

And if the wife joins in mortgage she has no more right than any person entitled in the equity (a) 1 Vern 294 277. & is postponed to the mortgagee —

If man has mortgaged & after marriage he makes a jointure — the mortgage is not affected by the jointure — the wife may take down or redeem the mortgage & if she redeems she will hold it — but if she joined in the mortgage she would have to bear her proportion to wit. one third. (b) 1 Ch. Ca 271, 1 Vern 213 2 Bac 228

If after marriage she joins in a fine to the mortgagee she must pay her proportion i.e. 1/3 & if she does not redeem she must keep down Int. If mortgagee knew of no jointure he may tack an after contracted debt 1 Ch Ca 119 Pow. 315. If husband before marriage enters into bonds to leave his wife a sum of money on his death & he dies — could she redeem as creditor — the judges conceived the bond good against his Ex. (c) she is a contingent creditor until his death as if he becomes bankrupt, — a bond is given to husband & wife, he dies, it survives to her 2 P Wms 497. 8 2 Ca. 94 If husband takes mortgage in the name of self & wife & he dies first — she is entitled to the land — If three men agree to buy the estate, the same as if he wants to convey it to his wife & knew she would hold after his death — & it is a good conveyance except as creditors — Aull. 2 P. Wms 364. 5 2 Vern 683. 10 Ca. 94. The mortgagor made the mortgage before marriage & the wife comes only to be en-

(a) For a mortgagee is entitled as a trust estate of which a widow cannot be endowed — But in Law — a widow may be endowed of an equity of redemption. — & In Eq.ᵗ a husband may have curtesy of his wifes mortgages. — and a widow may be endowed in the reversion expectant on the determination of the estate or term mortgaged. for the termination of the time vests the estate at Law — Pre Ch. 133. 2 Vern 403. —

(b) but a covenant by husband & wife, that he & his wife will levy a fine, would not be binding upon her in case of his death & it being a maxim in Law that a fine cannot be bound without fine. Pow 339. 1 Eq. Ca. Abr. 61. 2. see also 2 P. Wms 127. 8.

& If the wife join in the fine without reserving expressly her right of redemption. she does not part with her estate absolutely there is a resulting trust for her to have her estate when the incumbrances is paid off Pow. 346. 2 Cha. Ca. 161. see also 2 Atk. 384. 1 Vern 213. in. as to the mortgagee she is considered in Cha. as the mortgagee is entitled to his profits as virtually possessed of the wifes lands estate —

(c) The mortgage being originally the estate of the husband the wife by consenting to charge her lands with it does not make it less so than it was before. — 2 Vern 689. 604. 1 Ch. Ca. 137 Case 185 if there were to be the intention of the wife to be considered as a creditor she will not be considered as such. 3 B. Ch. 211.

allowed in the equity — she cannot be thus in allowed
1 Atk 606. 3 P Wms 329 — 2 Atk. 138 2 Atk. 525 contra 1
P. Wms 700. Pre Chan 187. (A) i.e. of a mortgage in fee —

Mortgage by Husband & wife of her fee
hold estate — The husband is by marriage, only en
titled to the wifes freehold only during coverture and if she
has issue, during life by the Curtesy Powl 337.
(b) but the wife may join with him by which
the sale is absolute and of course can mortgage
them — indeed the wife can bind herself & her heirs
forever if the husband does not disagree to it —
2 P Wms 127. Tab. Ca. 41. 1 Vern. 61. Eq Ca Abd. 361. 1 Rolle
365. Stat. Con 265. Suppose the wife separately or with her husband levy a fine
conveys away
in manner that does not bind her & after the hus
bands death she confirms it. it is called a re delivery
& good. — of course a contract respecting her lands
is not void, Doug 53. Peake 154. 2 P Wms 127. 2
Ves 526. Comyn 201. it is only voidable — as to personal chattels the
wifes contracts are void. If wife with husband makes a lease
& survives the husbands death she receives rent to her own
is good this being a delivery. 2 P. Wms 128. or execution —

If wife joins in a mortgage & it is for
feited & the mortgagee lends more money upon this
security agt this wifes will, it will back — Pow. 342
1 Vern 41 The mortgagee has now the legal title but
not as much equity as the wife exclusively —

The wifes land is mortgaged to answer the
husbands debts, although she lived a fine. his personal property
shall be first applied in discharge of them — (a) after all other debts
are first paid. Pow. 343. 1 P Wms 264. & before legacies unless) 1 Ch. 347. —

Wife encumbers her land to discharge the husband's
she holds the husbands land until the heirs with redeem
she standing in place of Mortgagee. —

The principle upon which the courts have decided is that the mortgagor how by the mortgage the legal title & also as much equity as the wife or heir has to be restored to the possession & when the equity is equal the legal title shall prevail

If a feme sole be convey a mortgage & marries and the husband makes a settlement in consideration of her portion or fortune, it amounts to a purchase and all her choses will go to the husband. Pow 328. 352. Eq Ca Abg. 68. 2 Vern 501. 511 And if she dies it will go to him but if he dies first it will go to his representatives & not survive to her. Pr. Cha. 412.

In case of a voluntary settlement after marriage. L^d Hardwick says it would not be a purchase the wife being unable to contract. but what if she should take this settlement says Judge Rawle why will it not have the same effect as a jointure after marriage? If she took it I should think she would be bound by it. Pow 324. 350. 2 Atk 424.

If a settlement be made upon the wife before marriage, but in consideration of part of her fortune only it will do away the general presumption that it was in consideration of the whole & in such case it is apprehended that what is not specially conveyed to the husband will survive to the wife. Pr. Cha 63. Pow 350. 1 Eq Ca Ab. 70.

If the husbands creditors get possession of the wifes mortgage & so indeed if the wife or her trustees get or have the possession of the title deed. The Courts of Chan. will not interfere so as to take from either any legal which she or they may have acquired 1 Peer Wms 548. 3 P Wms 197.

But if the husband will make some reasonable provision for her the court will interfere and Wms Gould thinks bankrupt creditors have the same right — 1 P. Wms 382. 459.

Although the court of equity will not interfere against the wife in favour of the husbands assignees yet it will in favour of a specific assignee of the mortgage by the husband for a valuable consideration — It will not interfere in favour of creditors who have only a general lien on the husbands property, but only in favour of those who have a specific lien 2 Vern 270.

A mere executory agreement by the husband to assign for a valuable consideration his wifes mortgage as security for a debt, with a delivery of the deeds will bind the mortgage pro tanto i.e. to the amount of the debt for which the assignment was made 2 Ch. Ca 207 3 P. Wms 364. the residue belongs to the wife as her chose in action.—

* This rule is liable to be qualified by the intention of the Mortgagor—

When a settlement is thus made a covenant to be made
If the wife dies first the portion they both will go to him if he
dies it will go to his Exr Pow 351, But if settlement made
by both in consideration of part of her portion
it amounts to a purchase of that part — covenant (or pay
back) If the wife dies before settlement but after
covenant for it — this will amount to a purchase &
both will force him to make the settlement upon her
him P. 62 312 Eq. ca. Ab. 70 Pow 357. 2. 2 Vern 68.

Sometimes the settlement is made of a
specific worth & if it does not amount to so much
it does not amount to a purchase of her fortune
2 Vern 68. 1 Eq. ca. ab. 68. Pow. 352. Remember that if the wife
is mortgagee the husband is as much entitled to her
mortgages as to her bonds & notes &c. and if he receives
them to prosperion they are absolutely his both he
cannot dispose of the mortgages but on valuable consideration 2 Vern 161
2 Vern 170. Pre Cha 118.

Out of what funds mortgages are to be re
deemed — In Eq. there is a great distinction between
the heir & those who are to pay debts —
The rule is that the fund which has been in
creased by the debt is to pay it — as where land is
mortgaged for payment The heir may call on the person
al property to redeem before volunteers take and af
ter payment of debts — thus in Eq. the heir may be
tempted to redeem when the land is not worth re
deeming — no such temptation in our country
Vaik 449. Falk 54. Pre Cha 61. 3 P Wms 358. 1 Eq. ca. ab. 269.

If personal property is bequeathed among relatives, it goes to exin. to mortgagor —

T. R. 213

If one purchases an equity of redemption his heir or devisee has no claim upon the purchaser's personal property to discharge it. Pow. 412. 1 Bro. Ch. 401. For if the money due on mortgage is not the debt of the owner of the equity, the estate itself or the owners debts shall bear the burden. his affairs have not been benefitted & of course are not liable 1 P.W. 347. 1 B. Chaba 58. 454. —

(D) is a receiving more than lawful interest makes the contract void receiving more means the statute punishes. 2 Mod 307. Doug 223. 4 Burr. 2259. 2 T.R. 241.

Suppose the mortgagee sues up the bond against the heir — the heir may immediately apply to the L.C. & compel the executor to pay the money for he must receive the estate unincumbered — so it is with the devisee

If the mortgagor bequeaths his estate with any manifest intention that it should be taken with the burthen upon it — it alters the case. — but even if the real estate is charged generally with the payment of debts, it is thus rendered liable only in default of assets. Our Courts say that if a man devises his real property for payment of debts he means to devise his personal. — [illegible]

A devise all his real property to A. and all his personal to B. & dies leaving debts unpaid all the personal property is to be first applied to redeem the mortgage see 1 Ves 51.6 2 Vern 718 1 Chan. Rep. 251.6 ditto if a contrary intention is clearly manifested It is determined that the heir is not entitled to the aid of the personalty when it has been specifically devised 1 Peer Wms 127. 1 Eq Ca Ab 298

If a one devises his estate "subject to the incumbrances" it is said the debts must be paid out of the personal property as the description is contained in those words of the particular estate for sake of certainty. — If devise clearly means the estate to pass without incumbrance even the heir must pay them out of real estate if necessary. Peer. 393. 2 Atk 424.

It is a general rule that mortgages which are usurious are void as well as bond & note. — so man that takes too much interest he forfeits his security & debt i.e. if he gets too much into his bond. or reserves too much. the bond is void — but if he loans as much as he takes note for but takes too much interest he is subject to penalty pro tanto. (2)

(a) on a receiving on the terms of the loan which is an usurious transaction. — the contract was made in Engd. to be paid there, but if made in ct Y. & to be P. there may include 7 p/c ct.

Renewing a note (originally made in ct Y to be P. there) in ct is not usurious, the 7 p/c ct is received.

It struck the name of the courts as a penalty. —

The grounds of it is that it is a gd. good policy —

L^d Hardwick said if a mortgage is given on 5 p^r cent & the mortgagee takes ass^t the mortgage is void. usurious is opposed to a private original agreement (a) 3 ch^r th^r 154. 2 ib. 727 1 Vg. 428 An arbitrary distinction has been made in Ch^a. between these contracts viz. one ag^t has been into to pay 8 p^r ct & 4 p^r ct interest & if the money is paid at the time they pay no more — but if the paym^t is not then made it is to accrue to five. this agreement will not be inforced by Ch^a. — but if the agreement is to pay five and if the money is paid by the time no more than four will be taken — Ch^a will inforce the latter Pr. Ch. 160. 3 Atk^s 2d Par 429 Pr. Ch. 161 2 Vern. 134 1 P Wms 662. 3 B. Par. Ca. 68. 3 Bl. 432.

The Courts will inforce a contract to pay compound interest. The principle is to take care of people who will not take care of themselves — it is not on the ground of oppression — They are not prepared to say that it is usurious — Pr Ch^a. 116. 2 ch^r th^r 331. 1 P Wms 65[illegible].

Suppose the mortgagee wants to sell the mortgage. — The principal & Int^t constitute the sum upon which the Trust is hereafter to be cast if the mortgagor agrees to it.

When an application is made to Ch^a. a master makes a report & converts interest into principal from the time the report is confirmed by the chancellor — 1 Vern 169 2 ch^r th^r 135. 3 ch^r th^r 271. 1 Vern 168. But if a man purchases with all the agents of the mortgagor when the mortgagor goes to redeem he is only to pay the simple principal & Int^t

If mortgagor agrees with consent of mortgagee after the claims is given to the mortgagor must pay interest on the interest. - It is a contract by the purchaser to pay the debts of mortgagor 2 Atk 135. 3 Ves 171.

(c) As in case in case of an infant. the bargain being good on his part the Court would not make it void -

(d) a person signing or acknowledgment that so much interest is due does not convert that interest into principal 1 P Wms 652, - The rule is thus an express agreement at the time of making the mortgage to pay compound interest is not binding. but after interest has actually accrued such agreement would be binding Dow. 442.

(e) The mortgagor having given no notice of his intention to make the tender. Such tender will also bar the right of the mortgagee to recover interest & probably also of his common assignee 2 P Wms 378 At Law it is sufficient if the tender always is ready to pay it. he need not take the debt from any to avoid profit of it -

There must be no connivance or unfairness to convert Int.s into principles. & not an assignment for that purpose merely 2 Eq Ca Ab 329

When the sum is liquidated between the parties i.e. the mortgagor & assignee in the assignment this act. does not bind the mortgagor. 1 Vern 168

When there is a suit pending & the Master in 62 reports the sum due so much 600 £ Int. £600 principal the court decrees that the sum to be paid is £1200 principal with the Int. on it — which runs from the confirmation by the Chancellor — for such report confirmed is in the nature of a judgt at Law 2 Vern 135. Pre Cha 116. 500. Show 429. 1 P Wms 478. 553. 376. but if masters report agt an infant it does not in all cases convert the prin. into Int. when the Inft is Dift it never does — If however the Infant is Plff it does 1 Eq. Ca. Ab. 287 2 Bro Cha. Ca 56. — 1 Vern 392 2 Ray 25. There have been cases where the bargain was very beneficial compound interest was allowed. (c) 1 Cha Ca. 1 Eq. Ca Ab 287. It is not law that interest upon interest is to be allowed except after liquidation and agreement to pay it — but the report of a master, or an agt to pay it made after it has accrued will secure it. 2 Salk 449. 2 Atk 331. (d) Effect of tender after the day is past i.e. forfeiture — If a tender in certain cases is made by mortgagor to mortgagee the mortgagee after this can take no interest — (e) a case of this kind. is where the same due is exactly known by both parties — no tender is good when the sum is uncertain — & the man that makes the tender must make oath that he has kept the money laid off — ready for the mortgagee & received no advantage from it himself 2 P Wms 378 2 Vern 372. 678. 3 Atk 90

Lay in nothing when bills are offered make bills good tender

Tender of bank bills is not good except the party say "I have no objection to them merely as bills" — 1 Eq. Ca. abd 316 1 Vis 339. The law of tenders respecting mortgages & notes bonds &c are all alike — the tender must be made to a mans person, & the place & pay. is vague 2 P.W.ms 378. i.e. not particularly specified — If place & time are appointed the mortgagor cannot make a tender at any other time or place — but a tender at the time & place is good even if mortgagee is not present 2 Eq Ca Ab. 601. — If no place is appointed & mortgagor appoints one, giving Mortgagee notice who does not object to it & it is reasonable a tender at that place is good 2 P.W.ms 378. — And so in one case where the mortgagee kept away to avoid a tender — one made to the house of Mortgagee was called sufficient 1 Eq Ca. 29. —

But if the mortgagee has any doubts as to any legal question arising upon tender he shall be allowed a reasonable time to satisfy himself by counsel

So also when a tender is made by a person claiming the equity of redemption he shall be allowed time to investigate the fact whether such claimant is the real owner of the equity — 2 Eq. Ca. Abg. 603 3 Atk 90. —

And when any other person comes to redeem because the mortgagor does not he shall have time to satisfy himself —

Powell says Interest may be altered on a mortgage by parol agreement — this is not exactly true — but a parol agreement may alter a contract & the parol agreement will be admitted to rebut a claim in equity —

(a) i.e. if the price of the loan is proved by either party & if mortgagor proves the price at which it was let that will be considered the price for the whole time unless the contrary is proved. Ld. Ca. Ld 53.

(b) Although there be a private agreement between the mortgagor & mortgagee for an allowance for the mortgagee's trouble in receiving rents & profits of the estate, yet the Court will not carry it into execution for equity will not allow him any more than his principal & Salmon 2 Atk. 120. Prec. 466.

(d) is without consent of mortgagor — the mortgagee being accompanied in possession before assignment. — 1 Eq Ca Abr. 328. 3. Bac Ab. 658. 2 Ld Ca Ca 3.

On the method of accounting

When a mortagee to B & continues in possession there is no account to be made ab. 2 Atk 107. Doug 266. The Mortgagee may wish to get possession. may bring an ejectment. may sue in right of the mortgagor & must account after getting possession 1 Vern 476. 2 Atk 534

Thus he accounts the bailiff of the mortgagor the rents & profits are applied to the Int. & the residue to the principal. — If he leases, the sum to be accounted is liquidated, (a) if not he must account for the clear annual value after accounting all reasonable expences —

But the mortgagee in ordinary cases is not allowed anything for being overseer — but if he lives at a distance he will be allowed the expence of hiring a skilful overseer. (b) Pow. 466. 1 Vern 316. 3 Atk 518. 2 Atk 120.

In accounting, it is a common thing to transfer notes bonds &c secured by mortgages, and when the mortgagor brings his bill for redemption, ^ each man that has been in possession must account for the rents &c while he was in possession only. If mortgagee assigns to a bankrupt the rents & profits for the whole time are to be allowed against the mortgagee. such an assignment being breach of trust (c) Pow. 467.

The general rule in accounting is what the mortgagee has received, not what he might have received — that the court will not indulge gross negligence or default. 1 Vern 45 Eq. Ca. Ab. 328 1 Vern 476 2 Ch Ca. 3 Ch Ca 258. 3. Bac Ab. 657. 8.

(a) He is not bound however to account for the profits which he received or might have received before notice of the subsequent incumbrancy — the sole question notice & not dismissing & Rushing out subsequent incumbrances — 2 Rep Cha. 209. His assignee does not injury if no subsequent incumbrancy. — Pow 468.

1 Vern 267.2
1 T.R. 760

(c) i.e. as long as the other creditors are then kept out. reckoned from the time of the petition delivered — Pow 469.

After the mortgagor has assigned his interest a bill brot for redemption against the assignee must join the mortgagor as party for he must account for the profits which he himself has received. 1 Eq Ca 594.

Suppose it is not the mortgagor that comes to redeem but the second or third incumbrancer — the rule is more strict — & he must account for all the profits a diligent man might have made 1 Vern 270. Pr. Ch. 30. Pow & Mg. 3. Bac Ab. 658. (a)

The second incumbrancer is not interested in how much he pays because the mortgagor will have it to pay to him & it is the mortgagor who has all the benefit of this strict construction. — It may be that the first mortgagee will not take possession when the after mortgagees wish him to — the second incumbrancer may eject the mortgagor & if the first mortgagee gives the mortgagor his title deeds to prevent the ejectment which is called forcing the rule in equity is that the first mortgagee is to account for the rents & profits while the mortgagor remained in possession. (a) — the first mortgagee does not loose this sum if the mortgagor is able to pay it. 1 Vern 267. 3 Bac 658

When there are several mortgagees & the first settles his acct with the mortgagor & the second comes to redeem this liquidated sum is what he is to pay if there is no fraud or collusion 1 Eq Ca Ab. 12.7 3 Bac. 659. 1 Ch. Ca 299. But when the mortgagee sells his estate & makes up an account with the assignee of the sum due on the mortgage unless the mortgagor assents to it he is not bound by it 1 Cha Ca 68. Pow & Mg 472 After several assignments the last assignee is not bound to account for the profits before his own time & they shall be set off against the interest which had previously accrued — 1 Cha. Ca 102. Pow. 472

In Con. the rule is the same except when the payment is made short of a year the interest on the estate is cast to the end of the year & also on the payment and then comes the subtraction

Kirby 49. 335.

If mortgagor attempts to oust mortgagee title at law. allow the expenses of mortgagee in defending shall be allowed him when accounting on Mortgagors bringing a bill to redem 2 Vern 536. Pow 473.

There are two modes of accounting —

1 By annual rests — is by an application of the surplus of the annual rents over the Interest to the principal

This is not done unless the surplus is very large for it gives the mortgagor great advantage. 2 Atk 534

2 The common rule is to add the sums of rents &c together and applying them to the aggregate of the debt & Interest —

The computing of Interest is very important in the case of mortgages. —

The rule recognized by the U. S. Courts —

Cast the Interest upon the sum due the first payment and substract the payment from the amount found for the second payment cast the Interest on the sum due after the first payment exclusive of the interest. then add the interest & substract the second payment & so on —

Always apply the payment first to the interest & the surplus to the principal —

A claims black acre & so does B. and B. is in possession & A sells the disputed title to B. A & B both forfeit the value of the land — but if a mortgage is sold, it being personal property the purchaser will not be injured — & it is so decided in Mass. & Pennsylvania

The time limited will be somewhat in proportion to the debt
demanded by the Court of such length as to secure all possible equity

And if articles are entered into to sell

Foreclosure —

It was that unreasonable that the mortgagor should have this incumbrance upon the land. there being no probability of redemption — & the Court of Chs will foreclose against him — If mortgagee goes into possession of the land it turns the mortgage into real property — & if he does not, foreclosure does not. —

A decree of foreclosure is not peremptory, but conditional as if the debt is not paid within the time limited the equity is foreverbarred 2 Just 198. Foreclosure may be opened by petition after the time limited is passed for the consummation of the decree if the mortgagee must be bound the foreclosure is thereby opened

It is common for a lessor of lands & mortgage the reversion. the lease is a prior incumbrance

The application in this case is for a decree of sale & not of foreclosure, which it is in power of chancery to grant

Prec 475.

Every body who have a specific lien upon the land not evidenced except thy have a right to be made parties to the bill 1 Br Ch. 368. 2 Vern 365. 1 Vern 232

Foreclosure will never be decreed unless after forfeiture

(a) Under certain circumstances the will grant an injunction to stay proceedings on an ejectment. Pow 417. 2 Atk 344

Mortgagee may bring ejectment if there are no other mortgages but if there are others he cannot thus cut off their right to redemption. - 2 Vern 271. 2 Salk 680. -

(a) So without summons if it appear upon the hearing that the personal representative is not made a party the heir cannot proceed Pow 479.

Remainder man is not bound by a decree of foreclosure against tenant for life unless he (the R Man) is made party to the bill Pow 483. 2 Atk 101. 1 Ch. Cas 217

If the heir is joined in the bill he may the lands on paying up the mortgage money if he gets the decree & does not pay the Ex. by bill can get the lands from heir.

It is laid down in the books that in a bill for foreclosure the mortgagor has no right to dispute the mortgagee title — that it not true if considered as denying the right of contravening the fact that mortgagee is entitled to the right person to come to foreclose Powr. 476 2 Cha Ca 244.

Suppose the mortgagor has actually got the title when the mortgagee comes to foreclose, the Ct will decree a foreclosure what in this case is a mere nullity.

The mortgagee may pursue all his remedies to secure his money 2 Atk 344. as on the bond. bring bill to foreclose, an ejectment at law all the same time (b) and in some states may levy upon the equity and thus secure the legal & equitable title

& in those states when the levy is not made but the land is sold at the post. the mortgagee may apply to Ct. for this sale.

Granting a foreclosure is not a matter of course. Cha may act with discretion as when the is prospect of its being injurious — 2 Vern 271. 1 Vesk 680 When mortgagor has applied to redeem & the Cha. have fixed a time for the purpose if he does not redeem - the Ct upon application will immediately, without more delay dismiss the bill which is equivalent to foreclosure - 2 Atk 267. If the mortgagees heir come for a decree of foreclosure or to have mortgagor pay the money it is good cause of demurrer that the Ex. of mortgagee who may have title to the mortgage money, is no party (d) Powr 479 2 Cha. Ca. 29 — 1 Cha. Ca 51.

(a) Hence is the ~~wife~~ of the mortgagor be of chattel Interest the personal representatives of the mortgagor need not be made a party to a bill of redemption - they have no interest in the equity of redemption of a freehold estate. — 3 P Wms 333 note

(b) In this case (the mortgagor Exr not being party) the Exr may by bill against the heir & mortgagor recover the land even tho the heir will pay over the money to the Exr & take the benefit of the foreclosure to himself 2 Vern 67. 367. 193

(c) even tho there were no debts. So if mortgagee in fee dies & mortgagor will not redeem, or the mortgage be foreclosed. or if the mortgage be of so ancient a date as not to be redeemable even tho the mortgagee be in actual possession the rule is the same 2 Vern 193.

If mortgagor tenant in tail & forecloses it bars his heir. it is barring Parr 483. 2 Atk 101. 1 Ch. Ca 17) it into fee. because he has the power compleate over the estate. (not so in tenant for life (pur autre vie)

(d) Not so with femme covert her disability arising from her own act — see Parr 488. 9. 3 P Wms 252. 238. 2 P Wms 460 3 Atk 712. 1 Vez 305. — she may however avoid the deed after cov. for minority. It is said that a mortgagee must procure an order of sale & not of foreclosure when the owner of the Equity is an infant. 1 Vern 295. 2 Vern 229. Pr Cha 184. 3. P Wms 504

Mortgagor (1 Eq Ca. Abr 318) devises. the devisee may bring a bill without making the heir a party.

When the mortgagee himself comes forward to foreclose the mortgagor, Eq. need not be joined — the bill is to be brot. ag. the Hr alone except in case of shelter in trust (a) Pow 479. If the mortgagee Hr gets a decree of foreclosure it will be binding 2 Vern 66. 1 Vern 367. as against mortgagor. (b)

When the Hr proceeds to redress of the equity of redemption the Eq. of mortgagee are to have the benefit of the mortg. 2 Vern 193. 2 Eq Ca Ab. 608. (a) Months in Ct of Equity are lunar months in a Ct of Law are kalendar months —

The Devisee may bring a bill to redeem when the equity is devised without the Devise —

The mortgagee will recover ag. as many subsequent incumbrancers as he joins in the bill 2 Vern. 518. 185. 663. 8 days is given to a minor Hr. viz 6 mo. after he comes of age to shew cause, &c. Pw. 62. 185. 2 Vern 342. 392. 492 Vs 23. 2 P Wms 401. Pow 489. 3 P Wms 352 1 P Wms 504. 2 Atk 532. If mortgagee has been guilty of fraud in the taking his foreclosure, the foreclosure will be opened 1 Mod. 153 1 Eq Ca Ab 600. 609. Vern 476 — i.e when the party is under a

a judg. creditor lends money to the mortgagee to redeem — but the mortgagee forecloses the foreclosure will be opened — 2 Vern 501 Pow 492. (Not so if mortgagee had no actual notice or cause.)

The first mortgagee foreclosing the mortgagor but not the second mortgagee — the latter must pay all the expenses of the foreclosure when he comes to redeem 2 Vern 185. I do think this unreasonable if he knows of 2 incumbrance

(c) the reason of this rule obviously is that the interest of the mortgagor in the lands is vested, but subject in equity to the subsequent ~~creditor~~ mortgagee

Regularly a foreclosure is not to be opened when the mortgagor has acquiesced for several years in the possession of the Mortgagee under the foreclosure — In Eng. it is the practice when the mortgagor does not redeem within the time limited in the decree to make it absolute by fault or else

Not uncommon for bill. to undergo this time set in the decree for foreclosure — 1 Eq. Ca Ab. 605.

Foreclosure is never opened in favour of a mere volunteer — we have at least no instance of it 1 Ves 206. Pre Cha 423. 1 P Wms 291.

First mortgagee obtains a decree against all the parties concerned — declares it to the mortgagor the foreclosure is open to open 2 Vern 235. 1 Vern 148. Salk. 276 — and the land is now subject to a gain to the 2d incumbrancer which one of the nature of an equitable estoppel (e).

If the mortgagee sues the bond after foreclosure the foreclosure is thereby opened. 1 Eq Ca 317. this suit amounts to a waiver

It has been determined but not now believed that foreclosure was a satisfaction of the debt — this in Eq. — provided possession be taken 1 Rep. 202.

It is not uncommon to divide away the bond whereon the foreclosed premises the foreclosure is opened. — Long acquiescence in the decree makes it difficult to open the foreclosure. —

Eq Ca Ab 177.

It is not the sum alone of the debt & land being valuable the causes a delay — but all the circumstances taken together. means intention receipts payment &c — I was never concerned in but two cases in which the foreclosure was opened.

(b) Mutt. Pow. c. 256. f. 264

Notice

Notices are of two kinds viz
1 actual or express &
2 constructive or implied

A man is said to have actual notice when he is party to a deed to which notice is annexed upon him but a flying report is not notice. & yet we are told that anything which is sufficient to put the party upon enquiry — the rule is this if the report is of such a nature as that the party may know where to inquire. — A being about to lend money to a stranger to the contract, on mortgage. some one says "B. has a mortgage of this land" this is not actual notice. (b)

The presumptive notice is made up of a set of facts from the existence of which the party must be presumed to get knowledge —

A man has a deed containing a recital of a fact. he must be presumed to know that fact. — 1 Vern. 319. 2 Vern 662. 2 Eq Ca Abg? Gilbert Rep. 8

I.S. devises lands subject to legacies and mortgage to B. B must be presumed to have notice of these incumbrances as he will have occasion to examine the will. so a deed containing a prior charge upon the lands is delivered to the purchaser among other deeds. he is presumed to have notice of this prior charge Pow. 266 2 Vis 486. Pow. 271. 2 Vern 384. The rule laid down that whatever is sufficient to put a man upon an examination is notice, is to be understood as above explained.

A recital of a deed stating or necessarily implying that there is a prior incumbrance on the land - is deemed sufficient notice to the person holding the recitising deed -

(b) even when one is agent for both parties. 1 Ves 55. as in marriage settlements. —

(c) A question has arisen in Eq. whether a subsequent mortgagee can take his equity to the legal estate by purchasing in the legal estate, on the intervening incumbrancer whose deed is recorded. — On principle such records ought to be esteemed as notice, for certainly their object is to give notice to third persons merely and not to the immediate parties — but in Eng. the post of registering intermediate incumbrances has not been considered constructive notice. — Powr. 287. 1 Eq Ca. Abg. 615. 2 Eq. Ca. Abg. 609.

(d) A subsequent mortgagee registered is preferred to a prior one not registered. if subsequent mortgagee had not actual notice. 1 Ves. 64. 3 Atk 646 2 Atk 275. 2 Bro. P. Ca. 425 —

(e) This holds equally with incumbrancers & common purchasers —

1 Vs 387. 1 ath 490. 522. 2 ath 54. respecting recitals (a)

It has been said when a man has been in possession of the land for some time it is notice to a stranger of the incumbrances the possessor has

notice to a mans attys or agents when acting as such 1 Vs 61. 6 q. 55. 2 Vs 477. 485. is constructive notice to the principal (b) 2 Vern 574. 1 Where a man acts without authority & the principal after ratifies his doings it makes him agent ab initio

1 Bro. pow. 6h. 244, Pow 275. 2 Vern 609

the acts of bankruptcy, &c

an intervening judgement will not prevent a subsequent mortgagee from taking unless it be proved he had notice.

Pow 283. 4

In our country the utility of registering deeds is becoming more & more known & the practice is gaining ground in all our States — it is not practised in Engd except in four counties — The man that gets deed recorded first holds the land except in certain circumstances — If two deeds are given by the owner of one piece of land if the last grantee without notice of the first grant gets his deed recorded first he shall hold it. (c) A subsequent mortgagee having notice of a prior mortgage not registered cannot give a priority by registering his own deed & purchasing in the legal estate. Pow 712. 1 Vs 62. Vern 664 3 ath 646. 2 ath 275. (d)

A man that purchases for a valuable consideration, with notice of a prior voluntary grantee, shall hold it. (e) Rea. I do not think this according to 6 L

It is established by Stat of Eliz. 27 th manner of the Stat. is perfectly technical. that is that the after sale is evidential of the first voluntier grant being fraudulent. — shewing a dis
1 Eq ca ab. 384
bow 280, 711.

If one purchases of a prior incumbrancer with notice and sells to one who had no notice - this notice will not affect the last purchaser —

A mortgages to B & then to C. C to D who has notice of the prior incumbrance and then D sells it to E without notice, E who had no notice at the time of purchase is not affected by the notice which D had —

A purchaser with notice himself from a person who bought without notice may shelter himself under the first purchaser 2 Atk 242.

Further A sells to B. who has notice of an incumbrance on the estate; B sells to C who has no notice, and he to D who has notice, this does not revive the first notice to B. Eq. abr. 331. 2 Wms 494. 1 Atk 571.

Co. Litt. 35.171
2 Bl. 295.
4 Cru. 10

Seal is necessary to every feoffment, formerly by delivery of the deed. now delivery of deed not necessary to pass land under 29 Car. 2. & now even if for less than 3 yrs. but record. So in Ire no such necessity.

The deed must be written before the signing & delivery to it for seal & delivery of blank paper with direction for filling it up. it will not be his deed. 4 Cru Dig. 26. Shep. 54

* Which statute enacts that all leases for years except leases for three years & on which there is reserved & rent of two thirds of the annual value - must be in writing - as well as all contracts respecting lands (c) for the deed must be sealed & the contract need not be. - -

Alienation by Deed.

Modes of acquiring estate are two viz by purchase & descent.

Any mode of acquisition except by descent is by purchase. — Descent is when an estate goes upon the death of an ancestor to the person designated by law as the heir

Whenever a man parts with his real property it must be done by deed i.e. by a sealed instrument

This rule was established long before the Stat. of Frauds & perjuries, conveyance was formerly made by livery of seisin, afterwards this livery was united with the deed and no witnesses were required to the deed, the execution was proved by marking, after words reading and in conveyance of freholds by livery of seisin —

A deed must now be in writing executed & sealed this sealing imports a consideration if nothing in the deed rebuts such presumption —

Leases for years continued to be by parol until the Stat. of frauds, of 6th. 2d which has been adopted by most of the States in the Union —

all executory contracts respecting lands must be written tho it is not necessary to seal: same as leases for years & signed by the party

So there is a great difference between a deed executed and a contract to convey (c) bonds with usual covenants. The conveyance is a trust

Matter of estoppel in a deed is not conclusive as to [illegible], that is, is not conclusive unless pleaded being matter of avoidance. 3 Co. t. 346. 15. 1 Dow. C. 166. Etp. 233. 306. A deed without covenants either express or implied is not matter of estoppel.

& afterwards a man might use power of sale his property and lands if the deed were given to him & his assigns. & could assign one fourth of lands which he is limited

I will notice the subtlety of conveyancing.

The northern nations who broke in upon the Roman Empire had no such idea of holding lands as we have — they parcelled out lands into wilds of the chieftains in continual subordination: after wards they gave mansions for a more precarious tenure & in process of time leases for years in consideration of faithful service during war, after this estate for life were introduced which continued a long time the greatest estate known. — Estates were then given to a man & his heirs which meant heirs of his body at first only. — There was no power of alienation. — this power which was first introduced was restricted to part of the estate to wit one half with consent of the chieftain. — then the portion was increased to the whole of the lands if the heir consented. —

Stat of Henry 1st gave liberty to a man to sell & dispose of that the lands which he himself had purchased. (b)

It became afterwards that a man might sell one half of the descendible estate by Stat. Henry 3d.

and by the Stat of gifts & conditions he might alien the whole of his descendible lands — so there was no more distinction between lands purchased & inherited as to the power of alienation. except the king tenants in capite & they had the same power upon paying a fine. by another Stat. — the third fines were abolished by Stat 12 Car. 2. —

By 13 Eliz. c. 1 Lands became liable for debts - one half only and that by ~~Stat Mer & Stat. Staple~~ being guided corrupted & requiring only execution — & after wards they became liable for all specialties

If the land conveyed is described by mutes & bounds, & answers that description the grantor is not liable on his covenant tho' the land should fall short of its quantity mentioned in the deed; for it is a rule that a description by mutes & bounds will always govern unless there is a special covenant as to the quantity. 1 Sw. 305. When the mutes or distances given do not correspond with the boundaries mentioned, the latter will govern, & the grantor will not be liable on his covenant. if it falls short. If the description is by mutes or lengths of line or quantity, the grantor will not be liable if his lands answers the first description. The monuments will govern if they are clearly ascertained, if they are doubtful, the length of the line is a fair argument to shew that one rather than other was intended. But if the description is by quantity only the grantor is liable on his covenants for deficiency unless the words "more or less" or similar ones are introduced & it is only in case of quantity that these or equivalent words are of any use. These rules are chiefly founded on adjudications in our own country, for lands are generally not so described in Eng.d Doug. 148

An estate to a man and his heirs no means that he may do as he pleases with them only they go to his heirs if he did not dispose of them.—

In time of Henry 8th a man's land might be taken for any of his debts, specially or simple contract one moiety of them, during his life after the owners death it is only liable for specialty debts—

In middle states the land is sold at the post to satisfy debts after the debtors death—

Who are disable from making deeds

1st When a person is ousted of possession, his deed would be void at common law. (copied in Cow. 71) Stat 13th Eliz. 8. in affirmation of the C.L. and for matter contrary to the C.L.

It is to prevent lawsuits arising from disputatious titles.— the man ousted may and to the disseisor & it will be good as preventing litigation Plow. 88. Hawk. P.C. b 1 Lev. 300 2. 31. 290. Moon 751. Co. Lit 369. 48. 214. 390. Cro Eliz 447. 36. 45 Hawk 14 By the Eng. Stat. the prosecution must be in a year to recover the premises. of but C.L. fine could be recovered at any distance of time. Moon 751. as was done in that case 1st does not mean that a man being ousted, but may be one in — not does it refer to the remainder or reversion.—

2° Attainted persons are disabled — has however no effect in our law of — corruption of blood not known in America. —

his children may — king ipsius a commission to enquire whether lunatic or not & a demand if the return is in the affirmative to motion to and another method is by Scire fac. filing a bill in Chancery

If an idiot levies a fine or suffers a recovy. his representatives as well as himself are bound by estoppel. Co. Lit. 247. 2 Co. 124. 12 ib. 123. 4. Cro E. 107.

If a stranger joins with the owner the deed is still good so if one able joins with one incompetent. Shep. 81. 2. 2 T. Rep. 472. 1 H. Bl. 614.

In Eng. it is an exception to gen. rule that a feme covert can convey by fine joining with her husband. In her own right.

3. Persons non compotes mentis are the third persons disabled — it is said a man shall not avoid a deed by stultifying himself — but Fitz. & Nat. brev. contains a form for this purpose 2 Bl. 2 95. b. 7

The a lunatic could not avoid his own deed by any means were found to accomplish the destruction of such a deed by interference of the king who takes care of all the lands in the kingdom. Dow. says a man may in this way defraud. — Cro Eliz 38. 4 Co. 123. Hob. 114

In the 21. E. 4 the lunatic's deed may be voided in his life time. — in Cont. Chap. it was decided that he may void it himself by plea of his own Infancy on the part. — Cro. to him good.

They can purchase & convey but are not bound by their contracts. their acts are not void but are voidable only. — except for necessary. — yet and if the infant can have his privileges unless it is considered as void. tho it is void not voidable.

5 Coverture is the fifth cause

A feme covert can purchase & is capable of receiving lands in any manner soever but her husband disents — & by her conveyance (I think) alone her of lands will bind her & her heirs — & when she joins with her husband it destroys her estate & makes complete conveyance

If a woman sells her lands the disent of the husband relates to the deed — if he does not it binds him forever — 1 Ed. 6. Comp. & Collinson, A woman was found a lunatic upon her husband's (expending) estate & was divided to him —

Qu. cannot she create a term for years to take effect after husbands death?

If a feme sole delivers a writing as an escrow & then marries, on performance of the condition during coverture the deed takes effect by relation to the first delivery - so if she had died & the contingency happened. Shep. 57, 72. 5 Co. 35 and if conditional to be delivered over on grantors death it is good & if attested properly may be a will. - Swinb.

If a principal becomes non compos his attorney may still execute his trust but if he dies it is otherwise. - 2 Day. 66. Shep. 70, 2.

A deed is delivered to A to be delivered to B it is valid until B disents. tho he know nothing of the first delivery. 1 Inst 150a. 1 Stra. 165. 1 Pow. C. 3rd 589. 2 Day 375. - and if B should dissent when A tenders the deed, he can never afterwards claim it. the delivery has lost its force. and it is said grantor could plead non est factum. Shep 2nd

Those crimes or felonies which occasion forfeiture of goods &c in Engd. forfeiture never vests into the prop. it only is not a consequence of the prop.

A woman cannot make conveyance of her lands during
her husband's life to take effect after his death
in accordance with the gen
main that a freehold estate cannot commence in future.

But a remainder may be limited upon a life
estate. however a wife cannot grant a remainder
after the husbands life estate, because the estate upon
which the remainder rests did not commence at the same
time with the remainder

6th The next persons who are disabled from making deeds
&c. are those whose minds are sunk - who in fear of
loss of life limb or property - and, made by such persons
are only voidable because they may be restored
and afterwards by a new deed - the king was so strong, the
Judge stated the case of a man being found in bed with an-
other mans wife & commanded to save himself &
7 Aliens, or alien friends or minis

Doctrine of alienage depends upon an antient State -
Aliens can purchase but cannot hold, the land
goes to the King - aliens cannot take lease for year
except of house shop & garden - this law is in
equitable it ought to be that the deeds should be
void, and an alien ought not to lose the valuable consideration

But lands are bot. & held down by aliens and his
children born there, will be subject but his wife can
not be endowed if she is opposed -

Roman Catholics are now capable of holding
lands by a late statute.

What is evidence of delivery? words are not always necessary
Must be good & valuable consideration — signed & sealed, whether
witnessed or signed by C.L. is not settled — If illiterate or
blind it must be read. Love without blood relation is good
consideration money & marriage is valuable. A good consideration is not
good against creditors tho they are against grantor — this is not out to
ground of actual fraud but of justice. Of other property would
this property cannot be taken In Powell Ch. no consideration
Every C. & P. contract requires a valuable consideration but if executed
& property parted with the donee has good title to any species of
personal property without any consideration, this is agreed by all.
But a grant of real property without consideration shall inure to
use of grantor it is said. Conveyance "to any use we"
were made to prevent fraud future, these words were finally left
out the consideration inserted. it was understood to be for the
use of grantor — The legal was always held to be in grantee —
The reason of all this is now done away with that
now such grant without consideration would operate as well
as it did & still does as personal. The a good gift
no return to presume such grant meant for use of the
grantor — but & opinion how it would operate as a
gift of — above. so no consideration is necessary to give validity to
an executed contract if delivered

This ~~was~~ originated ~~the riot~~ under L^d Geo Gordon. by which the papers of L^d Mansfield were destroyed ~~to the~~ great distress of Judge Reeve — in '80

There are seven requisites to a deed

One of the requisites which I shall now notice is that it must be delivered see Co Lit 35 — it must be delivered by the maker — 2 Roll 24. if on trying the note ~~& the~~ the deed it is a good delivery — Com 95 35

Can a deed be delivered as an escrow to the grantee. Pow doubt this case a conditional delivery to a third person, but can there be a delivery conditional to the grantee? Co Lit 835. says there can be —

The bargain is made. A says this ring to B if you deed me potatoes or if you do not it is not my deed. — the condition being performed or the act consummated, the delivery is not good unless the condition or event take place but the delivery is good if the event is uncertain as to time or distance Hob 5 — says Judge Reeve — a thing act is to be done by them.

Idyes 34. Moore Rep 697. Yv. Bk. Hn 5. 27 contra a grant of estate could not commence in future.

Co Lit 520. 884 Moon 62 2.687 19 Hn 5. 84 Co Bk 6

Hob. 246. 2 Roll 25. 9 Co 137. 6 Co Lit 36.

Judge Reeve thinks these the three cases in Co Lit viz 835 520. 884. ~~The~~ irreconcilable The two latter the apparently different from the first, were decided by the same judges and do not differ in principle Judge Gould I believe thinks that a condition imposed by the grantor when he delivered the deed to grantee would be nugatory & quotes Shepl. 59. 4 Bac 89. 6 Mod. 218. 1 Roll 87 Co Lit. 520. 884. 835. 9 Co. 137.

In an unsealed contract requiring consid:n to be valid yet if a consid:n is stated in a written contract, want of it cannot be shown by hands, but if it specifies a bad consid:n the contract is undone hastiness. Suppose it should not acknowledge a consid:n it may be averred & proved, for it stands with the agreement.
(in such case it will take effect from the delivery as an escrow.)
As to sealed & unsealed instruments. - If no consid:n is expressed in a sealed writing no consid:n need be proved or averred. but if not sealed it must be averred & proved. when sealed the presumption is that that was one. The quantum of consid:n may be inquired into & if there was none, when sealed nominal damages only will be recovered & Ch[J] will not upset it. -
Now is it then that on a bond you recover the whole. - you must never say anything, it is sealed. You recover the whole because the action is debt when you recover the whole or nothing. Suppose it is sealed & consid:n is stated & stated to be nothing or mere rush. the presumption is rebutted.
In all cases you may complain if any in a consid:n as late as 2[d] Will. this has been questioned but now since —
In action on cov:t for damages as to build a house under seal, you cannot prove want of consideration for the seal implies something of one, but the action sounding in damages you can prove the quantum of consid:n so that the recovery will be only nominal. —

With respect to delivery as to laying down & taking up of Ps 1 Leon 140.

If from all these facts the jury find delivery they will find an escrow — if there is no intent to deliver there is no delivery. so in case of an escrow

That deed may be delivered as an escrow to a stranger is not contested at all. 2 Roll 25.

Sigillum was not necessary by Ct sealing was, which implied signing — signing now required by 29 Ch 2 c. 3 Co Lit 6 b. 45 Ch 4 12

Bern Stat. only requires signing — sealing is not necessary to the validity of a deed —

The deed must be said to the grantor if he is ag mentioned in this 2 Roll 25. 2 Co. 3. 9 otherwise not —

The date of a deed is those figures put upon the deed to show the time of delivery & is prima facie evidence of the delivery at that time — the deed takes effect from delivery & a mistake in a date may be shown by proof — if there is no date, it is not vitiated but the time of delivery may be proved by parol — same if date be impossible

"From the day of the date" has been held to exclude it "from the date" to include the day of dating, but in Comyns 7/14 L^d Mansfield says they mean the same thing & the manifest intention of the parties must not be frustrated by construction of these words & nothing certain as to sub can be found shown — that if no intention can be gathered the grant

Co Lit 6. 2 Co. 5.

2 Roll 21, Yelv. 193. and this has been followed since. —

Between grantor & grantee the conveyance is good without recording, reasonable time is always granted. & an after purchaser can never get the precedency by recording first if he knew of the prior sale. Title is complete without recording but it may be lost by negligence. — Cowp. 712

So says Judge Rose but in 3 Bo. 35. it is determined that the second delivery after the covenant is removed does not make the deed good because the deed was originally void as well as the delivery because of the incapacity to make a contract. (I.e. the law with respect to infants) But if the contractor at first delivery hath power to contract - but cannot perfect it until an impediment be removed - if the impediment be removed before the second delivery the contract is good & delivery too.

The second delivery hath all its force from the first delivery

Sometimes witnesses are not necessary by C.L.

By our Stat: two witnesses & acknowledgment are required - the latter is important - it furnishes strong ground to prove the delivery - the grantee being in possession & then further the acknowledgment shows strong testimony of delivery - for the deliv itself requires the presence of no witnesses - but if grantee came unfairly by deed this presumption is rebutted -

Another requisite in some States is recording the deed - this has no effect upon the goodness of the deed if it is not recorded the deed will be always good agt grantor. a bona fide purchaser will hold agt a grantee who has not recorded, if he get his record - the law gives a reasonable time to record the deed

One who delivers that has no capacity to deliver as feme covert & after coverture she redelivers this is a good delivery - the first act here is not void but voidable & as all voidable instruments may to be confirmed - When she delivers this deed it has all the qualities of an english deed, in deed, in fact & in effect as to delivery - her after delivery has made it - & tests when are the witnesses to prove the second delivery? must they not sign the deed again? - yes - & as proof of this second delivery is required

Judge Rives conceives the difference between the delivery of a deed & an escrow to consist in this that first of the deed was void and the second delivery must stand on its own ground

They have attended the C L in some kinds of little comparative moment

Suppose she delivers it as an escrow & when she delivers to a third person as an escrow she had no capacity — when her coverture is removed, she then delivers it which relating to the first delivery is not good for an escrow has effect from the day of the first delivery (a) & her entrance at time absolutely void. — She has not ratified it: & the person has no authority —

Suppose the grantor has capacity to deliver but something impedes the effect of the delivery — but if this impediment is removed a redelivery is of no avail — for the deed was void to all intents & purposes — as if the making of the deed were supposed. —

The deed was delivered as an escrow, this is not a conveyance (contrary to the rule) by an dispensation the implied is removed & the deed redelivered, the delivery was said to be good —

(the deed in last case was not first absolutely void when delivered as an escrow but the after delivery is like a new making of the deed.)

Co Lit 248. Cro Eliz 216. 3 Co. 35. 2 Roll 26

The deed may become void as against creditors when good as between the parties by means of fraud to defeat creditors — if a deed is made with intents to defraud creditors or purchasers it is void

Eliz, 13th 27th

these Eng statutes have been adopted in fact by almost all the U.S. & considered by lawyers as in affirmance of C.L. — The laws of fraudulent conveyances in Engd are applicable to our country for Ld Mansfield Hardwicke & others consider all these statutes as in affirmance of the C.L.

For explanation of these Statutes of 13 & 27 Eliz. in 2 Bac Abg 607

Qu'ai if the first conveyance is fraudulent as to the conveyee and he sells another purchasefor good consideration & after words the first feoffee also purchases another for good consideration & the feoffee of the feoffee will hold the land against the second feoffment of the first feoffee —
2 Bac 607 Sid 154

The distinct objects of the R Eng Stat appear to me to be — as to fraudulent conveyances. the conveyance is good as between grantor & grantee — the object of the law was to prevent the passage of the land out of the way of creditors. as it is supposed that the grantor does not absolutely part with his land.

In case of fraudulent conveyances the law supposes a trust between the parties, that grantor have the benefit. A creditor may levy upon the land for it is treated as belonging to the debtor.—

The Stat 27th as to purchasers was to prevent deceit by conveying land to a volunteer & afterwards to a buyer for good consideration — the latter will hold but if there is no creditors the first is good.— & the purchaser for good consideration holds the land for this second conveyance to the purchaser shews fraud, although the first deed was good until the second was made, & even if the purchaser knew of the first grant. by reverting to the state the law was before the Stat of Eliz we shall see the reason of this Stat declaring that the purchaser shall hold.— 6

A bona fide purchaser will hold if he did not know of existing debts of seller although seller intended to defraud—

General rule is that the person that pays his money is entitled to the land & he who pays first is entitled if there are two purchasers for quis prior est (8)

If convey'd clearly for more than it is worth it is pounds
but will not secure the debt.

1 Fraudulent conveyance between parties and all persons claiming under them is good against the grantor his heirs &c. & Assigns whether the property is real or personal. — & even without consideration

2d For a means to prefer one creditor to another although effectually to defeat the other creditors is not disbursing so as to make the conveyance fraudulent this is the rule of the B.L. Bankrupt estate are divided by Statute

Or in any one creditor by legal process secure his own debt in exclusion of others —

3d Suppose this conveyance absolute to one creditor in exclusion of the rest to secure a debt, not to pay it this is a fraudulent conveyance: for there may be more conveyed than is necessary to pay his debt securities are usually larger than the debt I.e. if it is done by a clear deed trust or mortgage to one in this way is not fraudulent. — so if it is an absolute deed to pay the debt it is not fraudulent. but if it is absolute to secure only it is fraudulent — and if by mortgage it is not fraudulent —

4th The conveyance by a debtor to a creditor for an adequate price and as a trust is fraudulent i.e. in which there is a fair influence of a trust as to the residue of the value it is fraudulent in toto and so is no security for the debt so

Norman has a right to assist them in defeating their creditors other creditors will get the whole of the land & the party paid a full consideration

The Statute 13 Eliz. does not militate against any transaction bona fide and where there is no imagination of fraud & so is the common law. they say nothing against suspicion tho inconsistent & reasonable suspicion is evidence of fraud

Literally reading the statute those only who were intended to be defrauded but never so construed. But how could he intend to defraud those creditors who became so after and as to this it is said the statute makes the convey[ance] or w[ill] of fraud which vitiates, it. Here is a legal presumption not to be rebutted like presumptions of fact

So if he conveys to a bona fide holder. the legal presumption that he intended to hinder the statute intends him to

[illegible]

5th A conveyance for a full consideration ~~of the~~ if the grantee was privy to the object of getting the land out of the reach of process it is fraudulent. & the fraud consists in the privity of the purchaser.

6th Voluntar conveyance not made with intention to defraud anyone of his creditors ~~with~~ as to ^ defraud ^ are void as ag^t creditors — as the grantor although considered at the time of making as wealthy and sets up his son but afterwards becomes insolvent ~~this voluntary~~ and becomes fraudulent — as to ~~a~~ subsequent debts only however

The difference between Voluntary & other fraudulent conveyance is this that Voluntary conveyances are not void as to creditors who become so after the voluntary deed is made, but other fraudulent conveyances ^ intrinsically so are void as to debts contracted either subsequent or antecedent to the conveyance, This rule ^ (the 6th) does not reach a favorite price of property which a man conveys away to secure from process when he has other property to pay debts which is as available this last observation obviously refers to the relation stated respecting voluntary conveyances —

As to that of Eliz declaratory of the 6 or introductory of a new law — I have no doubt 27 Eliz but that it is declaratory & the law since the statute has made a new construction — for now an actual fraudulent conveyance is void ag^t both prior & subsequent creditors. see Law Rep. 105 ^ 56 Bro Eliz 444 ^ 44 3 TR 546. now to that itself does not make that fraudulent which was not so before, only establishes a rule of evidence 3 Geo. 82. diff division

The Statute declares only, that a paid volunteer conveyance which the Common Law declared to be so before. Bouf. 434.

Voluntary grants are conveyances without some consideration.

With respect to voluntary grants, since the enactment of the Statute where the intention was to defraud they are fraudulent by Statute as well as any other, where there is no such intention they are not liable for subsequent

1st Case When the voluntary grant is made to strangers, and where a settlement upon a wife & children in consideration of a marriage which is a valuable consideration. there are different decisions to be made, the first being without consideration is conclusively fraudulent.

2d When it is made as provision als settlements where the settlor is considerable indebted the Statute make it fraudulent as to creditors both prior & subsequent.

3d If made for provision of family, when no in debtedness, if for persons not in esse it is void both for subsequent & antecedent creditors

4th When provision is made as before except for persons in esse, but with intention to become indebted with no indebtedness immediately it is fraudulent. & his object is learnt by his getting indebted fraudulent as to both. 2 Atk. 481 subsequent & antecedent creditors

Not fraudulent is this, when provision is made for persons in esse family & in consequence not indebtedness & no manifest intention to defraud or badge of fraud, it is good as to subsequent creditors

This shews what is meant by voluntary conveyances not being fraudulent 1 Bro. 64 96. 2 Atk 11. 94. 481. 520 600. Dal 64. 64. 2 Vis 10. 2 Atk 610: 481-520:

Rule. If he becomes indebted afterwards and there is no proof of fraudulent intention the conveyance is good. —
with respect to child wife or other relation —

* and this a presumption of law that cannot be traversed

In case of 2 Vern. 10. L^d Hardwick said a voluntary conveyance, of real estate made by one not indebted, (the Marquis of Winchester in the recess in which he was called) for a child without any intents to deceive creditors is good: but if there is any badge of fraud it is void 4 Bro. 377.

But Statute says "avoidance to deceive" — it has been said that the intention could not be to deceive subsequent creditors but the law says that the intention is presumed for both subsequent & present debts. — for the Statute goes upon the ground that it always was wrong & subsequent acts go to shew the intention 9 Co 11. b Co L^s 158. & this principle applies to the 27 Eliz & is the only ground on which it can be viewed as affecting subsequent purchasers creditors. — for if he had been indebted when the deed was made it comes under the Statute of 13^th Eliz. —

The purchaser cannot be deceived for he knows he is safe against any conveyance before that by the Statute. so we must look back

When the Statute 27^th was made the conveyance not voluntarily made was good even against a purchaser for a valuable consideration

— the doctrine of construction of these Statutes in Roberts on fraudulent conveyances is very perfect —

6 Co L^s 158. 5 Co 60. Eq Ca Abr^d 334 Amb 288. Comp 280. 2 Bro b La 145

When you see a man selling what he had before conveyed away it is evidence of fraud—

The Law of Stat 13 Eliz avoids the debtor to sell land - there is no specific lien upon the land there is only that general right to the debtor property which will not prevent to sell - a man is no poorer by selling his land & not up able to pay - & the law supposes the facilities of collecting debts will prevent fraud in these circumstances - and the law does not presume fraud -

Consideration of marriage these are not fraudulent as to creditors unless they are made unless unduly long, for then is no presumed intent to defraud otherwise founds presumption of fraud

Husband is about to marry & settles land upon wife & children not extravagantly it is not fraudulent but a remainder over to a stranger in Shangai cases is there of any body but the wife, is fraudulent - if the husband further makes as to brother of husband settlement & a remainder over to his own family it is as to father, brother he not big bound to provide not fraudulent - but if to stranger it is L^d Ray 779. 1 And. 74 for him
2 P. Wms 248. 59. 350. 45

Settlements after marriage if husband is not in embarrassed is good against creditors - subsequent creditor could not treat it as fraudulent but a purchaser could treat it so - for this after sale proves he meant to cheat Cas Ab 158 2 Lev. 146. Comp 432. 278. 2 Br. 148 3 Vis Jur 617. now if this settlement after marriage is made upon a prior written agreement it is as good as if it was made before. if made casually according to agreement 1 Eq Cas Ab 354 1 Vent 143 Cas Ab 433

"And is good ag^t both creditors & purchasers - as if the wife is
when married an infant 2 Atk 520

Suppose such a gaumont was by parol he was not obliged to fulfill - but he did fulfill - this is all right if he does it exactly as the agreement was 2 Ves. 304. 6 Bro P.C. 434 - the agreement being void, more to the state of frauds & perjuries, but woman is bound to take advantage of it. indeed it would be often dishonest to take advantage of it.

The agreement was made before marriage, after marriage the husband enters into articles to perform it. - equity will not carry into effect 10 Wm 6 92 2 Ves. 304

(b) Suppose portion, are given after marriage to a wife in consideration of having received the wife's portion, it is good, - (by consent of parties after compromise & settlement) indeed equity will force him to make such as one if possible. 2 Ves 18. Ambler 121. 1 Atk 188. 2 Atk 477

By these settlements are meant those which are made for the support of the widow & children

But settlements made for maintenance upon after marriage will be good agt the grantor but void against creditors, if there is no other prop. to pay the debt.

That from whence agreement settlements affords presumption of fraud - you may see 2 Atk 152. Amb 596 This doctrine ~~is~~ relates to personal as well as real estate - Eq Ca Ab 349. Vern 490 - a man dies who has conveyed away his personal estate which is good agt his representatives - how shall creditor get it.

If the creditors will agree to it, the assignt. may for creditors generally the trustee is bound by it, but if any chooses the other cannot prevent his exercising himself in toto. —

Mr Howell's bye laws in Ch.

(3) or you may own the stone as Dr. in his own way for so in this country with regard to lands which are applied for payment of debts as well as personal property - this may be ascertained & directed to be sold. —

He must get his execution & levy it upon the goods wherever he finds them — or he may sue the assignee as executor in his own wrong

The assignment of his estate in trust for his creditors or some of them only, specifically is good 5 T.R 220. for he may prefer.

Is conveyance to a creditor whose debt is barred by that of limitation void or fraudulent? there are no decisions — I think the debt still remains & the proper order of things is to pay the oldest debts first —

Suppose A conveys all his property to B in trust for his creditors — the creditors can force a performance & a purchaser who has notice of the trust cannot hold at the vot. 1 Chan Rep 33

A gift by a man on his death bed to hold if he dies if he does not to revert — is good against Executors 1 P.W.ms 405. you may apply to the Ex.rs & get him to inventory such goods & they it will take thro his hands Donatio causa mortis 4 Term 777. 2 Ves jun 111

A man is in debt to A. B. C & D — the debt of D is a judgt for slander — he does not like to pay D a cowd will not let the malficio break in untill the rest are satisfied — that is — if there is a deficiency upon performance of the trust the debtor by Judgt in the case will leave Eq. Ca. 149 & this could not run after an assn in trust for cred.rs generally.

* It is not however a conveyance within the Statute, but relief may be had in Eq. considering the Children the beneficial objects of the deed in Floyd B to purchase lands for him & B took a deed in his own name &c. he holds as trustee. & you prove it to by the circumstances of purchase &c. &c. this case. if Children are dead. their heirs have equitable objects—

* If however a Judgt took place for his debt at ex: the bona fides debts might levy upon it —

In our country the Cons should allow a reasonable sum as a vol. bond so that it is paid in the event of such debts being first paid

A purchases a Lease of land pays for it & takes a conveyance to B. C. & D his children - this in the nature of a conveyance & to of Eq^ty considers it as a trust estate for the creditors not for the eldest Bro 1st 550. 2 Vern 590 70. 2 Ca Ca 231. 1 P Wms 111. 607

So when a man attempts to create a joint tenancy between himself & sons as above to point will consider it as belonging entirely to him 1 Vis 76. 2 Atk 481

use of voluntary bonds to vest conveyances of lands

2 man gives a voluntary bond the obligee ought never to recover any thing against creditors - in the life of obligor however he would be subject to it - but when he is dead the estate is to be settled & this obligee calls for his bond now this bond will be postponed to all the other creditors but he must be preferred to all other voluntary debts & legacies - & if there is a question whether it is voluntary it may be tried at law & if the creditors will come in & support the Exr in it it is as well as any way & if they do not he may call in the other creditors to support the trial by bill and leave them there at issue - 1 Bro 17. 1 Atk 293 Pr Ch 370. 1 Atk 625.

Thus is a case of this kind a man after marriage gives a voluntary bond to make a jointure of land vests his the wife accepts but the widow was ejected - & the bonds decreed that the jointure or the worth of it should be paid

The state will be disputed without you say purchaser shall not hold a purchase may always be had & if there is fraud you cannot prove it. But it is said there is no time. the first grantee might sell it & by so great his grantee? I answer the laws did not intend to prevent grantees selling for good consid^n. but here the fund of the debtor is not increased & he did not intend to pay his debts. & if grantee can hold the coercion of law is of no avail —

It is said the Eq^y. is equal in both cases & the fraudulent has pref^e qui prior te. interferes & prevents the application of the other mortgage. Answ. here is to be taking after mortgage. — But that declares it void. & in all these cases the contract can never be used for any purpose. — there is very good reason why indorsee of an usurious bill. there is much struggle for how the indorsee was not myself in the wrong — illegality —

(b) To this it is objected that the fraudulent grantee is liable to the creditors — what then. ought the creditors to be obliged to resort to him who may be a bankrupt. Again "prior it in time is prior in jure" — The creditors are prior in time to the bona fide purchaser and in analogy the rule adopted in case of theft. ought to be preferred. —

Creditors ought not to be thrown upon the grantee for their debts for they never placed any confidence in him the debts were contracted on the responsibility of the land. the land ought to pay them and the bona fide purchaser in this case is sent for his remedy to his grantor in whom warranty be had confided. —

In two states decided on. two the other.

Whatever ag^t. or rights or law a man has to avoid a bond or other inst^t. that follows the bond forever. so a bond illegal is void in Ch^d. it is void in hands of bona fide holder. —

In sale at fair. a man who has no title can convey one. this is founded in policy. but a private sale would not be

If an attention is obtained on such bond it does not avail anything. Pr Ch 17

1 Vern 202. 1 T.R. 590

Fraudulent conveyance against marital rights

A man is about to be married to a woman who has a great deal of real property - & he conveys it away to a volunteer to keep away from his husband. it is fraudulent. 2 Ch Ca 47

But if she has done it to make provision for children by former marriage. it is not fraudulent 1 Vern 408 2 P.W.ms 674. 357 On this subject there are contradictory opinions 1. Vs 26. 2 P.W.ms 532. 2 Br Ch 345

Celebrated Question. —

On this subject of fraudulent conveyances there is a great question upon which there are two opinions. — How a fraudulent grantee of a fraudulent grantor conveys a good title to an innocent stranger.

I say he cannot. — I do not think that one man who conveys so as to defraud his creditors, with such intention, can enable the grantee to make a title to a bona fide purchaser which shall conclude the creditors. — Shall the purchaser or the creditors in this case bear the loss - they are both equally honest & in equity, the scales are equally balanced. It is said that the debtor could have made a good conveyance to a bona fide purchaser and why may not his assignee in a fraudulent conveyance as the situation of creditors would be the same in such case. but says Judge Rose, the law is made to protect creditors and to give them every possible advantage. now when the debtor sells he receives a good pro quo which creditors may reach - but when grantee sells & gets the consideration. it is no advantage to the creditors, & how easily could the fraudulent grantee & grantor continue their conveyances so as completely to delude creditors. (6)

a title. as of a stolen horse. — Sale of goods under order of a court. — Right the Exr. is equal in both cases. but the owner is prior in time. — acc. said ag.st me 1 Vid. 133. 1 Sta. 245. 2 Kin 223. 3 Ew. 387. Godb. 181 these howlers are under the St. of Eliz. ad stay p.r purchaser. — that H. is a vol.r convey.ce to one man & after to another for valuable consid.n & under this situation. grantee can do. the grantor can do. so to who will shall first be who pays his money holds. this diff.ce has been overlooked. but it is decided the conv.ce under the 27.th is also one that how could be convey. you will observe this is a proviso in the statute that the gen.l grantee may convey for valuable consid.n acc. Cow. & Mar.y con. N.Y.

If the warrantee is against all legal & tortious claims the warrantee may recover in an action of covenant be him all damages & expence he has suffered in defend.g or ag.st such claims. —

If covenantor is notified, it is no matter whether he appears or not for covenantee if recovered can recover against him. but if covenantee had not notified, when covenantee comes upon him in warranty. he may shew title & defeat the action. this notice is commonly given by a summons by an officer of the court. — he could never evade a perpetuam on his covenants he could not say that he had a title. & the warrantee recover all damages. I was once engaged in a case of cov.t of warranty. bottom. I advised to give notice but my client thot himself safe & did not. but he lost the land & then sued the covenantor. he proved on the trial that the title was good & was again defeated. we however got a new trial & with the new ev.ce recovered the land again —

I was engaged in a case in Mass. in wh. the money was recovered & Indebt. a.st is the proper action.

Covenants in deeds

Deeds by which lands are conveyed contain the covenant of seisin & covenant of warranty, to wit that the owner was well seised & covenants to defend the covenantee against all rightful claimants.

A suit on covenant of seisin may be brot at any time by covenantee if he suspects or knows the title is in another. But a covenant of warranty means protection against all rightful claims no suit can be brot on it until ejectment of the covenantee (b)

When one is sued on either of these covenants it is his interest to give notice to the covenantor — but if he does not give him notice when the covenantor is sued, he (covenantee) could allege that covenantor did not properly support the title, & thus defeat his action

Quit claims contain no covenants if a man quit claims for good consideration, and the land is lost — if it was meant to be a bargain & there is no equity that there should be — the decisions however differ on this point

but when it was intended to convey a title he ought to be entitled to recover the money back for the consideration entirely fails.

No decisions of this question in the English books. — Then the grantor never gives quit claim except of bargain.

With us if the title is bad but some one has claim has determined that the money may be recovered in an action for money had & received.

Who may sue.

If covt is for inheritance the heir may sue for the breach even in the life of the covenantor — i.e. the covt runs with the land, or his assigns. — it would be immaterial whether heirs be mentioned because the covt runs with the land. (in personal contracts the heirs must be named.)

If covt in lease is to repair, the assignor & assignee are both liable to repair. — so of a covt to pay rent —

Suppose A for valuable consideration covenants with B. who holds land next to his not to stop a water course running thro his (A's) land & onto B's — B dies and A stops it the heir of B has his action agt A for the covenant runs with the land — even to an assignee.

A bounties assigns his farm attached to which is this covenant the assignee tho not named in the original covenant & tho there be no privity of contract between him and covenantor yet he may sue covenantor & recover the same damages his assignor might have recovered — for by donation of land the covenant is transfused to assignee

Who may sue on the covenants of seisin & warranty. —

If the breach of the covenant is in the life time of covenantee, dies his Ex^rs may sue for the damage if personal property — but if the breach of the covenant is after the death of the covenantee the damages go to the heir — but as suit on the covenant of seisin the executor must always sue. — But if on the the covenant of six warranty, the heir having received the land as his portion and is entitled to the action & damages 2 Vent 92 1 Roll 520. 1 Vent 176. 344 2^d Lev 26. no matter whether the heir was named or not. —

A leases to B for 20 y^rs for £20 and 7 s. annum & dies and the rent is in arrear — this rent belongs to Ex^rs — but if the rent is all paid up at A's death the rent for after rent must be brot. by the heir.

Suppose the rent is in arrear & two portions at. so that is a breach in non payment both before & after A's death, what was due at A's death is sued for by Ex^rs the other by the heir 1 Roll 521. 5 & 17. 6 Co Litt 385. 1 Salk 317. Every covenant of Warranty runs with the land. A sells to B with warranty B to C & C to D &c all in the same manner. if a battle one is ejected he may sue any former warrantor. a covenant with heirs cannot run with the land. it is broke at the very time it belongs to the Ex^rs if it is broken at all so as to vest at the time of the ceasing the land — in this case the heir is of which not of covenant. —

Who may be sued —

If there is a breach of cov^t. in a lease, the cov^t. being dead^d the Ex^r. is to be sued. the heir has nothing to do with the lands. — If it relates to realty the heir is liable as a cov^t. to suffer use of a water course. — quere. Both are liable for the personal part as in the hands of Ex^r. so any creditor may sue him. the heir is liable because he has the real debts & the heir is liable for the realty debts. In our country the Ex^r. gen^y. having all the prop^y. I conceive that the heir is not to be liable unless the claim arises after the estate is settled. — So in Eng. in case of personalty in Eq^y. you may go against the volunteers.

(If the warrantor evicts other lands the warrantee can come upon the devisee with his warranty if the eviction has not arisen for good consideration. —)

Decided in Ohio that Assets must go over the mortgaged land all the things. he may recover of our heir or volunteer & the boy his remedy over agst. the others. On the same ground the devisee is answerable.

The difference between a warranty & a cov^t. is that the former binds the grantor & as the case may be his heir, to assign grantee other lands in case of eviction, but it does not bind the personal representative, a cov^t. entitles the grantee to a recompense in damages only. I always binds the Ex^r. or Adm^r. it does not bind the heir unless named

Suppose the covenantor dies, who is to be sued,
A covenants with B that he is well seized and A
dies — he bound himself his, Ex^rs & Admin^rs
& the Adm^rs or Ex^rs may be sued as they are bound
for all debts — & even the heir tho he is bound
to pay only specialty debts —

In our States the Ex^r
is bound to pay all as he has the whole property and
has authority over real & personal property and
I do not think the heir can be sued — except the
Ex^r & his bondsmen have become bankrupts and
the heirs are in possession of the property — so it is
Eng'd. if the property had been divided the creditor might
in Equity recover against the heir for no voluntary holds against creditors

A covenants with a man & his
assigns there are cases in which the assignee can
sue the covenantor & whom they cannot —

Lessee A leases to B for 20 Y^rs who covenants
to pay rent & repair. now suppose B does not
he is liable — but suppose he sells his lease
to C, is C liable upon the covenant to pay
the rent & repair? this covenant does run
the thing existed at the time of making the con
tract and respects the premises & runs to the purchaser —
the purchaser is liable whether the assigns are men
tioned in the deed or not — he goes against either B or C
for the breach —

General Rule.—

When the thing exists at the time and relates to the premises the assignee is bound whether named or not — When the thing does not exist but relates to the premises. the assignee is bound if named and is not bound if not named.— And when the thing does not exist neither relates to the premises the assignee is not bound even if he is named.—

The Covt runs with the land when it relates to the premises and the thing is in existence.—

as if a Covenant to build a house for 4 yrs within 4 yrs.

It was however that this Covt but only during grantees life but it is in single case.— Impure Covts maybe restrained by injunc in equity. Tho. E. 675. 1 Ves. 175.

A leased blk acre. to B for 40 yrs. with a provision that B was to build 40 rods of wall on white acre another tot of ground then B or assignee of B is not bound even if the assignee was named because the thing did not exist at the time nor relate to the premises —

Cases where covenants are respecting a thing not existing but relating to the premises, A leases to B blk acre & B covenants to build 40 rods wall on blk acre the assignee of B. if named will be bound if not named he will not be bound. —

& If the lessee dies the covenants runs with the land. the one who owns the land will be bound to fulfill it. — Who one is bound if not named the covenants runs with the land. — B all that which is bound as well as the purchaser 5 Co. 16. 2 Ch. Eq. Cas. 287 552, & when bound if named to do some act upon the premises, but not in existence if this covenant is broken before the time of selling the assignee would not be bound 5 Co. 16. When the covenant is to do some collateral act not in any relating to the land it does not run with the land. as to build on other lands not demised. —

If the deed runs thus - "I give grant bargain sell &c and nothing more it implies a reversion of the land — if there is valuable consideration 5 Co. 17. Cadt 98. 2 Mod 92. Co. 267. Dale. 388. 1 Just. 384. 5 Co. 24.

Mr Gould says "it seems doubtful whether the rule" that a deed without "a consideration will enure to benefit of grantee" applies to any other deed than that of bargain & sale. I apprehend that it does not. The reason is that that kind of deed has its operation by the Stat of Uses. It owes its operation without a "valuable consideration" — a deed declaring no use enures to grantee. Comyn. Dig. 2 Bl. 296: 1 Ch. Pl. 251. Shep. 221. Cro. J. 396.

"Divers good considerations" without more not good for the Ch. cannot judge of their sufficiency the actual consid: however may in this case be averred & proved. 4 Cruc Dig. 38.
"Value received" held sufft. 4 Cruc 38. — When the precise consid: is expressed in the deed no other can be proved. 2 P.W. 203. 1 Vy. 127. 4 Mass. Rep. 135. 1 Pow. C. 368.

(1) as between donor & donee but not against prior creditors.

A who has sd to B for £40. suppose A should sell this land to C. could C. recover the rent of B the rent goes with the land and C could recover it. — suppose after leasing A dies the rent goes to the heir - as the land would have done if it had not been leased — but if the land had been leased for a term in gross not an annual rent it would have gone to the Executor — i.e. the gross sum would. — Consideration

Where there is no consideration the books tell us that the grant would inure only to the use of the grantor. — & nothing would pass —

A practice had grown ground of leasing land to one man for the grantors use - arose from, this the rents lands could not be devised — but a use could - and there was danger of the whole fee grove being thus swallowed up in uses — when this once began it was continued for other purposes - as in the Lancastrian wars. — & thus we were had to believe that when use A conveyed to B without consideration it should inure to the use of A & Chancery will enforce B to give A the benefit — as use was never subject to forfeiture — If A says to B "I will give you my horse" without any valuable consideration no court of law would enforce this engagement — but if the contract was executed & the horse delivered it would be good — & why should it not be so with respect to lands says Judge Rose —

(a) The word "Lands" embraces every attached to the soil and will pass them all in a conveyance without express reservation even arrears of rent notwithstanding a prior agreement and bd. can give no relief —

(b) although it would be good between the parties —

Mould half a dozen boards of sails pass if not excepted. or articles for repairs, these do not come within the principles towards not pass as lumber. — these are articles of ornament / property —

(c) The law however is that as the grant is to be construed most strongly against the grantor — that all the land will pass for the exception is void — being repugnant

a mangranted all the lands he had in certain place except such as he had by descent. he had no other lands or you must give some effect to the grant. it was said all he had by descent passed. some appearance of ground —

The least most immaterial alteration made in a deed by a party it is void. but if by a stranger it does not hurt the 11 Co. 27. Cro E. 622 and unless it were in a material part.

The acceptance of the lease by lessee the covts are binding upon him, as for rent as made use if in a separate instrument. the lease may be read in evidence for the rent. Before the St. of Frs settling up stakes by agreement which was affd

Exceptions in deeds —

If — is any part to be excepted it must be specified in the deed for if in a seperate instrument it would not affect subsequent purchasers. — & if the reservation is not made in the deed or in some sealed instrument what was intended to be reserved would be lost. — When any thing is reserved the law reserves every thing necessary to the proper enjoyment of it. — as in case of emblements — or a house if reserved the ground on which it stands is subject to the incumbrance as long as the house stands & Mod 11. 60 Lit 47

now the exception may contradict the grant if it does the exception is void. — but if a man gives all the land he owns in the world excepting those he had in Litchfield when he owned no other the grant is void — there is nothing granted for the conveyance says Judge Reeve (2) If a man grants a house and a shop describing it & then excepts the shop — the shop would pass — for the exception contravening the former grant is void. 2 Roll 454 Hob 170. 10 Co. 106 b Co Lit 57. An exception may be void for uncertainty — if you cannot understand it is undoubtedly void. — the case in the books of a grant of 20 acres except one is said to be a bad exception I see not why the grantor should not be tenant in common with grantee of the one acre Co. Lit. 47. There are a great variety of conveyances mentioned in Eng books — but they do not suit us. most of them

A lease is that in use and refers to an estate for years, or for life no particular words are necessary to create a lease. — Deeds of partition were of use to separate tenants in common or joint

A lease & release. a mortgage a lease for one year and then releases the mission. many states have conveyances originating in this. — (a person must be in poss. & have an interest to accept a release)

Uses v. Trusts

Some of the inconveniences attended this kind of estate viz. the bona fide grantee of the purchaser to uses would hold discharged of the use & the purchaser to uses could encumber with many conditions. But after a little the legal estate was no longer subject to dower curtesy & the purchaser to uses could not affect it except by alienation to a bona fide purchaser without notice. This privilege being found inconvenient the Stat. 27 H. 8. c. 10 Rich 3 the estate of certain uses is made liable to forfeiture to debts &c

This manner of conveyance grew out of the incapacity of not a living livery of seisin — A wants to sell blk acre and he cannot do it without livery of seisin — but a rule is that if one is in possession livery need not be made to him — unless was made to him in possession & the conveyance was complete —

An other mode is by bargain & sale — which appears to be only a plain case of sale in the form of it as a bill of sale — Land was once conveyed away to ones own use — as land could not be devised but the use might the land could not be sold but the use might —

this bill of sale amounts in a great to an agreement to let the bargainee have the land which the law will enforce — A grants to B for the use of C the land goes by the Stat to C with the uses 27th Stat Hen 8th

A agrees to sell to B. A does not sell it because he cannot but A is seised by this agreement to the use of B. and the Stat: declares the title to be with the use for that was bot with a valuable consideration —

Trust estates are now only to be thus regarded the estate goes with the use — Use was formerly not subject to for future — the legal estate was the use was devisable & surrendered not liable to dower or curtesy nor subject to be taken for debts or to any fraudulent purposes &c

There has a system of jurisprudence grown out of these estates of trust — which originated from the machinations of the courts and built up by Chan. in the precincts of the Ct of Chan. who stopped short at the first limitation after allowing the Stat to effect the first use and said the last use in an should have it by way of trust — of these remedies the Ct of Chan. availed themselves & erected an extensive & valuable system of jurisprudence

See Dyer 155. 169 —

are liable to forfeiture for treason but not to escheat for felony
these trusts are now created chiefly for the benefit of wives & children

13. and We have thinks that when deeds are to be recorded there cannot be a sale of an estate without notice if the trust were regulated & given in the same and a conveyance with the legal estate this however can rarely happen anywhere for the existing use is generally in suspension. —

Qualities of a trust estate — as they now exist in Engd.
Use is not subject to forfeiture in Virg. must be created by the same solemnities as real estate — the trust is real estate devisable. descendible — if equitable, — may be mortgaged or leased liable to curtesy but not to dower which means the dignity of the law — if land is given for the use of a wife Hf will take care of her interest — & she has the perfect command of it — may sell, devise and do as she will with it — so it may be given for the use of children — who are spendthrifts — & have discretionary power with respect compelling the trustee to convey to the children. Quaere if a man who holds the use of the trust dies & goes to his heir may be sold to pay debts
2 P.W. 780. 1 Ch. Ca. 291. 2 P.W. 640. as equitable assets, 1 Ld. Raym. 424

It is not uncommon in Engd to devise land in trust for his children & when they are grown up if they wish it conveyed to them they may compel the trustee to do it — this power is discretionary

If a man holds property in trust for an other and conveys it to a bona fide purchaser without notice the grantee would hold it. — Bl. 333. to 342

This deed that a man has got may be voided by matter of post facto as erasures — if the deed is attacked by the holder as all, material or immaterial the deed is totally destroyed — but if a stranger does it. if it is not in a material place it is not void. i.e. if it does not alter it. 6 co Eliz 626. 11 Co. 27. the same is the law respecting bonds notes &c —

Where the law requires recording, when the first purchaser has delayed an unreasonable length of time, the purchaser first recording will hold at law, tho he knew the land to have been conveyed before. (Gould) But under these circumstances the subsequent purchaser may be compelled in Eqy. to convey to the first. The subsequent purchaser is treated as a mere trustee to the first. 1 Fonb. 23. 1 Rob. 61. Amb. 346. 2 Atk. 278. 3 Atk. 646. 1 Eq. Ca. 765. The most immaterial alteration in a deed delivered by the party claiming under it will avoid it, as erasing a superfluous word. But the least alteration of several distinct covts. is altered, the deed is void in toto. But if made by a stranger it must have been in a material part to avoid it, i.e. it must have varied the construction or by all effects of the deed. When the deed is made void by alteration, the party plead non est factum. and if altered so as to avoid it by a stranger grantee may case after him. — Dyer says & Gould that where thus destroyed by a stranger the title may be claimed as under a deed lost by time & accident. so that the destruction of the deed does not destroy the right. 3 Co. 119. 11 Co. 27a. Cro. E. 621.

If two are bound in a deed & the seal of one only is broken off the deed becomes void as to both. if they are jointly bound seem if bound jointly & severally. The rule is so strict that if eaten off by a mouse the deed is void. Eqy. however will consider it evidence of an agt. to enforce it specifically. 2 Vk. 308. 5 Co. 25. 11 Co. 28. Cro. E. 546. 1 Fonb. 14.

A deed drawn in one form may operate in another to effect the intention. Shep. 79. 82. 2 Wils. 75. 4 Cru. 420.

If one of two grantees dispents his share remains with grantor. 2 Day. 305. 2 Bac. 140.

A deed is destroyed if the seal happens to get broken
this however is old Law and may now be questioned
5 Co. 23. 1 Roll Ab. Coke has much to say of the being
of the Law for says he if while the deed is in the custody
of the court the mice eat off the seal the deed is not
destroyed thereby. If however it were eaten off
when not in custody of the court it would avoid the
deed. Deeds now upon record in Court
which were made on Bank are considd. good

Suppose it is covered with wheat. you cannot sell it within 20 days at the port. as our law requires personal prop^{y}. the may must be for off^{rs} to keep & account for.

3 Geo II.

By C. L. Land are held by judg^{t}. Leffler conveyance would not take it away. But after levy, you must bring ejectment to turn out the possessor

for the third person turns out upon such execution has a right of action against the sheriff who has one —

Alienation by Execution

By the C.L. there was no such thing as taking lands with execution — but the rents & profits might be taken with a levari facias — another way was — A the debtor leases the land to B to avoid this writ, C. could levy upon the land which would make B. a tenant to C. and the profits only thus taken — This was all the methods at C.L.

Stat 13th Edw. 1st Westminst. Afterwards one half of the debtors land might be prized off under one writ — when a man was alive — but after he was dead all might be taken in both cases tho' only until the debts were paid — this is all we can learn from the books 3.6.12.

With respect to an estate for years it might be prized off as before of the estates or it might be sold by the Sheff.

I suppose a levari facias may be still in use I know of no statute to prevent —

In this County so much land is prized off as will pay the debt — & the creditor gets the land this is the law in all the Eastern states — In the middle States the land is sold at the post — & the Cred. gets the money the rents of the estate if any —

If however the State does not hit the particular estate as an estate for life or an estate for years which last is personal but not moveable to the post an old fashioned levari facias is the remedy — when it claims land which B is in possession of & sues B. the action turns very much into —

But if the execution is on a debt it may give a title after levy & I must bring an ejectment —

Conveyance of incorp. hered^ts is called a grant & always was by writing. —

An Ex^t. was held as something like a chamber. he might & might have lived upon, it by agreement tho unwilling. but if divisible after the rent would have been implied.

Death must come when nobody cares. A man can do what he pleases except turning off

Incorporeal hereditaments —

If little consequence to us — a right of way is an incorporeal hereditament — A purchases a right of way of B to a lot in the county of B. to him his heirs & assigns it goes with the land if the right is in fee

This right of way is sometimes created by an act of law as the owner selling a back lot or a chamber

A right of fishing is a incorporeal hereditament — This however never can injure passage up & down the river to which has heretofore appertained

A stream of water the law is that no man has a right to divert a course of water from the course when it used to run although it rise in his own land but if the land is unoccupied below he may do as he will with it — it depends upon occupation for the original right which must not be interrupted — neither may the water be injured — as by tan works — in this case the injury is subject to an action of nuisance.

Rent ascends to the heir with whom the land would go upon the rent is a sum in gross — this differs to annual rent which is real property

An annuity a sum payable yearly — and binding upon the grantor his heirs Ex^rs is real property goes to the heir — charged upon the person of the grantor if it belongs to the wife in her hands it is considered real property — and in all cases is real.

Devises by Judge Reeve

A devise is a disposition of real property made by the owner to take effect after his death.

The words "devise" "legacy" are used promiscuously but improperly, for the first is strictly to mean the testamt to personal property, so of the words devisor, devisee & legatee.

The effect of a will is different upon real and personal property ~~is different~~ with respect to the title which in case of personal property does not vest immediately on the death of the testator, but is in the Ex^r who must bring all actions for injuries to it, the legatee cannot take the legacy without permission of the Ex^r neither can he sue the Ex^r for it ~~before~~ after the debts are paid - it is only the beneficial interest that vests in him -

A will of lands under the various Stat. of wills is considered by the courts of law not so much in the nature of a testament, as of a conveyance declaring the uses to which the land shall be subject. Which makes the distinction between a testament of personal property which operates upon whatever the testator dies possessed of, and the former only upon such real estate as the testator possessed at the time of executing & publishing his will 2 Bl 378.

The title to real property vests in the devisee immediately on the death of the devisor. & there is no intermediate person in whom it can vest. The most ancient common law way that it vested free of all incumbrances whatsoever but by Stat. in Eng & the various States. lands are made liable for specialties

and may be attended on judgt. until the rents & profits pay the debt
a devisee may come in perperion immediately on payment —

If the devisee has sold the land. it is not liable however
in the hands of the alienee. but the devisee is liable to the full
value of the land — and the Courts of Eq. have assumed the
power to compell the purchaser to recovery to the creditors
if he knew of the claims agt. the lands — and will leave him to
his remedy against the devisee —

In an. acn. for them debts the devisee is made Deft. but
judgt. goes agt. the lands & unless the devisee pays the debt the
land will be attended until the rents & profits pay it.

Generally throughout the U.S. their lands are held liable
for debts of every description if there is a deficiency in
personal property — In some states the lands are sold at
auction & the money raised; in others the Courts gives an
order of sale for so much as is necessary to pay the debts
and in case of insolvency all the land is sold — As a
devisee does not give a good title agt. creditors — the mat-
ter — is that a man must be just before he can be gen-
erous —

History —

Devise of real property was in use at the time of the
Saxon monarchs. but was entirely discontinued at the intro-
duction of feudal tenures by Wm. the Conq. except in Kent
and a few antient burghs — a relaxation of devising the use
was then introduced. after a while, from the civil law. by the
ecclesiastics — the Stat 27 Hen 8th arrangd this matter by
vesting the land in the cestui que use — & thus alienation was again
at end — But as the bent of the times strongly inclined
to favour alienation Stat. 32 Hen 8th was enacted. which

gave the power of selling or devising all the manors lands to be held in socage & two thirds of the manors lands to be held in chivalry — the other third went to the king or other lord for custody & wardship — this was the first statute relating to wills — The Statute 32 & 34 Hen 8 was then enacted declaring that the words "manors &c of in Britain" used in the Stat 32 H. 8 to mean fee simple lands & says further that every person holding in fee simple. in severalty common or coparcenary who are not idiots insane. infants a feme covert shall have power to devise or convey away in their life time two thirds of such of their lands as were held in chivalry and all their lands held in socage — 2 Bl. 375. Wingates abg. 660 — And now by the abolition of military tenures by Stat Car 2d. a man may devise all his landed property except copyholds —

Tenants per autre vie & joint tenants are not provided for in this Stat and as no one could devise by C.L. they could not devise — tho' afterwards tenant per autre vie might devise by a subsequent Stat. Some of our Stats. have declared that joint tenancy is nothing else than tenancy in common. when this is the case the jus accrescendi is destroyed —

Our Stat. are worded differently in different States. some say "all the estate" — Maryland & one other says all the estate of which he is seized. In most however the expression is substantially "all the estate that a man owns" so a tenant per autre vie may devise. and in general title merely and not absolute vesting is requisite —

Our Stat. to empower "all persons" the true construction of which is that said persons may devise who could by C.L.

In this case the witness tho a legatee is not at the time interested
it may go to his credibility but not to his competency see Sect

make a Cestamint of personal property — they meant to put real & personal property as to devising upon the same footing.

Judge Reevy supposes that a feme covert could devise personal property by C. L. and as she is not excepted in our Stat. she may now devise real property. — She is excepted in the Statute of Army test as we have a Stat of wills in which all the other exceptions of the Eng. Stat. are mentioned but coverture. the Eng. Stat. has no authority here & she may devise as Rule Dom. Rel. 137. 154.

A governing maxim in the law of devises is, the intention of the testator must govern — fix that & you fix the construction — unless the intention is plainly inconsistent with the rules of law. But in deeds technical words are indispensable. — a devise to a man "in fee simple" will create a fee simple estate in him — so to a man & his issue will in a will. pass an estate tail — but it is not so in deeds in either case — but if a man should attempt by will to intail a library or a service of plate it would not avail because contrary to the rules of law. The rule is simply this that the intention is always to be followed when the thing intended to be done is not inconsistent with the rules of law — So you observe that the rules of construction of deeds & wills are very different. —

A will on its execution or publication conveys nothing — for in its ambulatory state it is always in the power of the testator and this is the reason why a second & contradictory will revokes the first. —

This is a great difference with respect to the donations of wills of personal and real property. for land purchased

subsequently to the execution & publication of the will does not pass by the will — but all the personal property of which a man die possessed will pass by his will whether acquired before or after the execution & publication. 2 Bl. 378 / 1 P. Wms. 575. When Ld Chancellor Parker observed the reason of the distinction is that when the land does not pass the law has a place for it in the heir but as to personal. if Ex. the maker before the acquisition, does not take it. it is uncertain who shall ——

But real property subsequently purchased will pass if the will be republished before witnesses. & (as is to be understood in both cases) words were originally used sufficient to pass all — A will speaks from the time of its publication — If a man devises all his lands in Litchfd to J.S. then purchases more land & republishes his will. all his lands in Litchfd would go to J.S. But if after making & publishing such will he had purchased a farm in Bethlem & then republished. that in Bethlem would not go to J.S. by that will.

There are some estates which may be created by will which are unknown to the C.L. and cannot be created by deed — they are called Executory devises: by which a freehold may be made to commence in future — a fee simple or other life estate may be limited upon a fee simple and a life estate may be carved out of an estate for years — the life estate is said to be greatest it should be longest — neither of these could have been accomplished by deed. — but by will they can be. 2 Bl. 172. 3.

Terms for years are devised by will like all other personal property

It is now settled that a contingent interest arising out of an executory devise may be devised. 3 Leo. 227 - 1 Am Bl. 30. 2 Bl. Ab. 222.

The English system which declared real property not liable for debts made it very necessary to allow devisor power to devise his real property to be sold for the payment of his debts, & before this personal property only was liable.— The person thus empowered to sell, sold under the authority of the power & it was the power which perfected the title — This right exists in all the U States and is of general convenience for as part of testators property may be of much more use to his family than the other. An Ex in such case does not act as Ex to as trustee and is governed by the rules of trusts. And when he has raised the money it is equitable assets in his hands. the debts are paid without regard to priorities & if the estate is insolvent they are paid pari passu. this is the law in all the States.—

There are some points determined under the Stat. of wills of Henry before the Stat of Frauds was enacted which are still held to be law—

Under that Stat. it was doubted whether estates in remainder & reversion could be devised since the abolition of the stat was "seised" it was decided at first that they could not be devised, but this decision was varied & a remainderman was said to have all the seisin the property admitted of when the particular estate was held by a consonant title and not adversly against him. & that was called seisin enough to entitle him to devise. Pow. 34 . A case had been framed for this determination as an equity of redemption was devisable and these decisions were undoubtedly correct for they restored the symetry of the Law 1. Hen. Bl. 30. The case of Bishop vs Fontaine in 3 Lev. 427 is not Law.—

An estate for another was not devisable under the Statutes of Hen. the thirty one made so by 29 Car. 2 — This is of consequence for us to remark, for when the wording of our Statute does not include such estate they are not devisable. Pop. 91 Co Eliz 58. 2 Roll. 150. Powr. 36.

No particular formality was requisite, if it is a provision made in contemplation of death it is will, being in the form & language of a deed or indenture does not alter it "any writing by which the intention of the party appears to give or dispose any thing & having the formalities required by law as signing sealing witnesses &c shall amt to a will" Finch 195 3 Keb. 310. 1 Mod 117.

A will may be made referring to a former instrument by which that shall become part & parcel of the will As if B. devise the rents & profits of lands described in a certain deed — An Ex: was directed to pay £1000 as he should find it directed in such a paper in such a drawer Co. Litt 146 In these cases the instrument refered to became part of the will. — In this case a man was directed to pay £40 to the devisors brothers children as he should find directed in such a paper — this paper was never found, but as he clearly intended to give the children a legacy we must presume upon the knowledge we have & divide it equally — 1 P.W.m. 530 Powr. Dev. 22.

I observed to you yesterday that a second will revokes a former one — this is to be understood with some exceptions, for a former will is not necessarily revoked by a subsequent one — A man may make as many wills as he pleases and they will all stand if they are not contradictory. 1 Show. 545. 553.

Although a codicil only revokes such Legacies, yet a sufficient will as a life estate out of a fee, should revoke it in toto this is the weight of authority upon principle a subsequent will should only revoke pro tanto.—

Pow. 23. But if they are thus contradictory the last one is to be prefered — If there is no apparent design to revoke the first it will not be revoked. and the difference if any will only amount to a revocation pro tanto & not in toto. 2 Atk 273. Pow 19.

So codicils alterations additions &c properly executed remain by consistent with the original will & not apparently meant to revoke it are only revocations pro tanto — particularly if written on the same paper spoke of the will as if it was in contemplation. — 1 Vis 187. 2 Vis. 242.

But a distinct will. executed — different from the first intirely & properly intended to revoke it always does revoke it. —

In a case the jury found the second will different from the first. but they knew not in what the difference consisted. — The Ct of C. Pleas pronounced it a revocation, because as the jury declared there was a difference it mattered not what it was. — But the Ct of B. R said it was not & so said the H. House of Lords. —

The Statute of Frauds required the deed to be in writing, but so soon was the construction put upon this requisition of the Stat. that a letter written at sea, and a draft made by order of a man in Africa tho he never signed or even saw it, were good wills under the Stat: Moore 177 Pow 25 —

The inconveniences produced by these decisions which were severely felt produced the Stat of 29 Car. 2 commonly called the Stat of frauds which has been copied by every state in the union —

Of the requisits of a will by the Stat of Car 2d.

The terms of that Stat had received an explicite definition in the English courts long before the inactment of our Stat. & of course our legislature must be considered as referring to those definitions where the terms are used.

II. All devises of lands must be in writing. whether the lands were devisable by custom or by Stat of Eliz.

III. The will shall be signed by the party so devising the same, or by some other person in his presence and by his direction

IIII. The will must be attested and subscribed by the witnesses in the presence of the devisor

IV. Three witnesses must be in number three or more.

V. Three witnesses must be credible witnesses.

It seems as if these rules were to plain to be misunderstood, that the construction of them has occasioned much litigation. —

But I would observe that wills made in foreign lands must be executed according to the laws of the country in which the property intended to be passed lies and have all the ceremonies required in a will executed at home Pow 52 2 P Wms 291.

Again. Previous to the Stat of 6th a man had not only power to direct his property to be sold, but he could empower another person to dispose of it by sale or by will — In which case the aliences title is founded upon the original power. which must now be will or the subsequent conveyance have been with respect by the Stat of 6th 1 P Wms 740. 2 Atk 268. 285. 2 Vs 179. Pow Dev. 59.

The first requisite is that the will be in writing. in

Recently did not suppose that a signing which was already done and
known it is manifest he did not consider it, it is settled —

this respect the rules before established are not altered & all existing statute require the same.

The second requisite is that the will be signed by the testator or by some one in his presence by him authorized — The intention of the stat. undoubtedly was that the devisor should set his hand to the bottom of the instrument. It has been determined that if the will is written in the devisors hand & his name is any where to be found in it, it is sufficient signing — This I think a dangerous decision particularly as no witness are required to a testament of personal property. Pow. 61. 3 Mod. 219. 3 Lev. 1.

In this case there was sealing at the bottom and three judges held that sealing was signing but three doubted. Since however a will came up, only sealed and seen by a person who it did not appear was authorized, sealing in this case was determined not to be signing. Pow 67. 1 Wils 313. Contra old decision 12 Mod. 764

But signing at the top is not always sufficient even where the will was written by the devisor direction, & pronounced by him to be his will or when he attempted to sign all the sheets but through weakness did not sign but part. it was wisely not considered by the Testator as signing the whole. it was not good signing — in this case — the attestation also was bad having been done while the testator was insensible Doug. 229.

The third requisite is that the will be attested & subscribed by the witnesses in the presence of the testator — The whole will must be present at the time of attestation i.e. in the room 3 Burr. 1773. In which case L^d Mansfield declared "It has been settled that it is not necessary that the "witnesses should attest in the presence of each other; or that "the testator should declare the instrument he executed "to be his will"

"Or that the witnesses should attest every page folio or sheet. Or "that they should know the contents. Or that each page folio or "sheet should be particularly shown to them" — Doug. 1775. —

The witnesses attest to the mechanical corporal act of signature by the testator. — they are instrumental as witnesses It is said that they attest the testators sanity. Pow. 68. This I doubt. because these very witnesses are often called upon to testify to the testators insanity and a man is not permitted in law to contradict his own asseverations. — and suppose the witnesses are dead. — 1 Vl 2 ps. 365. 2 Bl. C. 378 Ch.

And it is not absolutely necessary for the witnesses to see the signature made it is sufficient if the testator acknowledge it in their presence saying 'this is my hand writing" 2 P Wms 506. Pr. Ch. 184. 2 Vesy 455. 3 P.W. 253. Pow. 71. 2. 3. but when the witness did not see the signing but heard the testator say "this is my will". S^o Hardwicke decided Pow 73 2 Atk. 176 182. Pow. 82. Pr. Ch. 184. —

This rule further says that the witnesses must subscribe the will in the presence of the testator and appears to mean as to locality that the situation of the testator must have been such relation to the place of subscription by the witnesses that he might have seen them if he would, without locomotion i.e. by turning his head — the reason of this rule is to prevent the obtrusion of another will. Doug 230. . . . .

It was said sufficient when the witnesses could be seen from the bed thro a glass window. Cas. t. H. 81. So when a lady seeing the will in her carriage & saw a might have seen the witnesses sign thro the Alley window it was held good Pr. Ch. a 99. but when the witnesses went below by the request of the testator & for

his case it was held not good 1 P Wms 239. On this subject see Pow. Dev. 90 & onwards 1 Salk. 395. 1 Show. 89. 288. 1 P Wms 740.

In the case of Right v Price Doug. 229. it was decided that at the time of attestation the testator must also be in his right mind. & J Buller observed if he was not he could not tell whether the will attested was the one he signed.

The next requisite is that there be three or more witnesses. The law on this rule is best elucidated by example. A will was attested by two witnesses & afterwards the testator made a codicil on a separate piece of paper which he declared to be a part of his will attested by two witnesses one of whom was a witness to his will but it did not appear that the other knew anything about the will. both these instruments together did not make a good will. Cowtt 35. 3 Mod 262. 1 Show 68. Pow. Dev. 101.

A man made a will not by his own hand signed & sealed but not witnessed. afterwards made a codicil in which he took notice of the will, & this codicil was duly executed with four witnesses but they did not see the will which might have been in another room. will declared bad. Pr Cha. 270. 2 Vern 597. I suppose that if the will had been identified although in another room it would have been sufficient as in such a drawer &c. — certainly if the witnesses could identify it —

A will was found without a witness wrapped up with a codicil duly witnessed. the witnesses being called testified that the will was said to be present but not unfolded in their presence, their names were not on it & they could not identify it. it was held to be bad Pow. Dev. 104. Com. 384.

L. Bolingbroke's will was written partly on one and the rest on the other side of the paper and signed at the end by him but not witnessed. afterwards immediately under his signature he wrote a codicil & signed & sealed it. as there was room so when the witnesses to the codicil signed & attested on the other page over the beginning of the will it was held a good Com. 197. Pow Dev. 79. 106. 15. 1 Burn. 548

A man made a will of real property without a witness that a witness. it was signed but not sealed. afterwards on the same paper immediately following the will he made a memorandum of a devise of personal property only on a different paper properly attested and signed by three witnesses. was the will executed? it was present & contemplated. the witnesses could identify it. so it was a good will. if they could not have identified it. it would have been bad. the circumstance of a codicil being on the same paper only shows that the will was present & assists the witnesses to identify the will — if they can identify without it is a circumstance perfectly immaterial. — In the case of L. Bolingbroke the Testators declared the instrument (undoubtedly referring to the whole) to be their last will &c. 1 Burn. 548

The witnesses must all sign in the presence of the testator. and it was formerly said that it must be done at the same time by all. but this is not necessary as it is determined that an acknowledgement of the signature. running it over with the pen or reading is sufficient signing. 2 Cha. Ca. 109. 3 Lev. Rep. 176 contra when it is doubted Pr Cha. 185 as to the actual signature in presence of all the witnesses Pow. 112 —

the witness must be credible - What is meant by "credible witness" has been a question of great litigation in the Courts of Westminster Hall & the United States, than any other that has come up these many years —

The questions were - Are legatees or devisees of land - or creditors who would have lost their debts without the establishment of the will good witnesses within the statute? Or is such a will absolutely void as wanting them at or after the testators death. the witness might be disinterested & competent to be examined in support of the will?

The authorities on these points are pretty equally divided as to number & talents. part held that "credibility" means the same as "competency." must exist at the time of attestation. & cannot be dispensed with by any after post facto procedure. L^d^ Mansfield & those with him held, that competency according to the rule of law at the time the witness were called upon to prove their attestation, was sufficient. — One court decided with L^d^ Mansfield but the decision was reversed by the Court of Errors. —

It is agreed by all that when the will comes to be proved such a witness cannot be admitted. — But will not the testimony of a witness who it is acknowledged is properly disinterested, proving his own attestation & that of those who are devisees under the will as well as witnesses, be sufficient to establish the fact that the form of the Stat is sufficiently complied with?

If the word credible in the stat. means competent, it is superfluous as "witness" & "competent witness" are exactly the

same thing. if it means now we know nothing of it, as this is no attestation.—

If my sentiments are right it makes short work with the question.— By b. L. all mankind are witness unless they are interested. infamous or want discretion.— the only pretence in this case is that the witness is interested. credibility never goes to the admission. but to the weight that is to be given to the evidence — Is a contingent unsettled interest sufficient to destroy a mans competency. I think not. on this view there is no room to purge, that is, nothing necessary to be purged to establish the formality— I argue that he could not be a witness until the legacy was discharged after the testators death— A presumption his is a good witness although the cause is framed to prevent his becoming directly interested.— the contingent interest he has goes to the credibility but he is always admitted. Suppose [illegible] the witness did not know at the time of attestation that he was thus conditionally interested & it were necessary for him to know the contents of the will, it would be nonsense to say that he was so much interested as to ~~his~~ disinterestedness his being a competent ~~testamentary~~ witness within the statute — if he had been called instantly into court he certainly would have been admitted to prove the execution — an infant does not purge his non credibility as the judge said by coming to legal age — but he becomes competent — see L^d Mansf. opinion 1 Burrow 414. 1 L^d Ray 595. Contt 574 2 Stra. 1253 1 Day 46. The act of the legislature declaring creditors good witnesses & legacies to witnesses utterly void. is no argument

No case since the St. of 61 of wills being set aside for want of publication Testator said "take notice" when signing held good 3 c 4 R 156

Some wills were rejected for want of proof of being signed in testators presence. but afterwards held. to be fair to presume according to law. — 2 Sha. 1109.

against the foregoing reasoning - Pow 133.

Publication was a requisite before the Stat of Car 2 but a case can hardly occur in which when all the formal ities required by the Stat of frauds are gone thro with some circumstances would not take place which the judges might call publication, any thing which goes to shew that the testator meant it for his will is sufficient Pow Dev. 80 to 87.

Probate —

If the testator signed in the presence of all the witnesses & the witnesses in his presence & in the presence of each other one of them could prove it, as well as the whole. —

But when the witnesses are dead the hand & the testator & of the witnesses being proved did not prove the subscription to have been in the presence of the testator, yet one of the witnesses having been a lawyer of eminence the presumption was favourable — but on other case was without a second witness — in such cases we must be guided by circumstances & determine according to analogy & fairly. —

The requisites of a good will having been considered, we shall now notice those means by which a will may be come inoperative, that is primarily by revocation.

Revocation is either express as some declaration directly & expressly & distinctly made to revoke the will — or implied from some acts of the testator by which it may be presumed that he intended to revoke it —

As to express revocations by C.L. they might be made by parol & any writing whatever expressive of the intent was sufficient — This has been altered by Stat in Eng & the Stat has

been copied by many of the States. when it has not or some statute with like provision made the 6. L. remains in force. — In Eng. the revocation is required to be in writing & contain circumstances of formality required. — Some states require indeed most of them require it to be in writing & in some it is necessary to be witnessed. With implied revocations these statutes have nothing to do.

Then are some acts which may be called either express or implied revocations as cancelling. obliterating. burning or attempting to burn. these amount to revocations —

By 6. L. Words spoken when there is not really animus revocandi discoverable will not revoke a will. as if one in a fit of caprice because his device did come to pass him which sick says. "he shall not have my estate." but calls no witnesses him is not sufficient proof of animus revocandi — but if he had expressly revoked it & called witnesses. it would be evident that he intended his estate should descend to his legal heirs.

So too if a man only threatens his will. as "I will revoke" "I will alter" &c this being in future is not effectual. neither is it unless the language is used with reference to the instrument. — Pow 532

Then the words used must be animus revocandi. in present & refering directly to the will. 1 Roll 615. Cro J. 115. 4 97. Cro C. 356.

I observed to you that revocation implied was some act of the Devisor &c we last page back — It is upon this ground that a record inconsistent with revokes the former 3 Mich 511 3 Mod 206. Then appears to me to be a wide field for controversy on this point. Why should a second will be more de-

pactual revocation than a codicil which treats only pro tanto? 1 Vez 178. 186

Intention is the pole star in the construction of wills and if the decisions on this point have gone contrary it as they appear to have done - they are not absolutely binding - & certainly when the courts are not shackled by decisions the subject remains open for discussion —

A mere second will does not revoke the first. as it is not necessarily inconsistent. Pow 536. 3 Mod 203. 2 Salk 592. 1 Show 537. The jury found a second will but did not know its contents although they found it different from the first determined to be no revocation — 3 Wils 497. Compared 7 Br. Par. Ca 344. Vide 346, 10 Pages — contra B R & H. Lads —

Suppose the jury had found a will different & had not gone on to state the difference. I say it is no revocation for it does not appear that it was about the same property, even if they had found a second inconsistent or repugnant will. I should doubt whether it ought to be considered a revocation, such a verdict only shews their ignorance. it gives no evidence to the Court they put their own construction upon what the Court alone should determine. they might as well have determined upon matters not in their province but it does not appear — see Pow 540. 41

A man by a subsequent will or codicil may make a disposition inconsistent with his former will under a false impression as to matter of fact this is no revocation. as when a man gave to a stranger by a second will all his property under an idea that his son was lost at sea — But if the false impression be as to matter of law as that his devise in form void

could not hold personal property & therefore he made a new will to another this revoked the former. & is founded in policy as one il not so a door would be open for great confusion if one might say he did not know the law.—

A man makes a second inconsistent will and afterwards growing dissatisfied he destroys it. is the first will set up again.— If we go on the ground of intention I think there can be no doubt but it is— that is the law. & if otherwise many devise would not have their intended effect.— 4 Burr 2512 Powr. Dev. 529.

But if the subsequent will expressly revoke the former which is left intire & the revoking one cancelled, the former is not set up thereby. this is the law by decision Comyns 53. Doug 40 Powr. 551. This decision seems to me to be wrong— in the other case the will was as effectually revoked as in this. & why should an express revocation be more effectual than an implied one. there appears to me to be a distinction without a difference.—

The reasoning on this subject known is. that in the first case the revocation is only implied from the act of the Devisor. that act is ambulatory until his death & if he destroys it. it is considered as if it had never been, but in the second case he expressly revoked the first will thereby most clearly shewing that he did not intend it should stand—

Events may happen from which it may be fairly presumed that under those circumstances the testator did not intend his will should stand.— as marriage & the birth of a child— for it could not be supposed that he would not provide for his own. Powr. 554. 5. 6. 4 Burr. 2171. 1 P Wms 744—

This rule is not universal, for a will giving small legacies of little value in proportion to his estate is not thereby revoked such legacies are often given when the devisor has a family at the time of devise given. And so a will made in the life time of a first wife was revoked by a second marriage 4 Bac 3182, -

A man made a will & gave all his property to a stranger he then married & had children, made a new will giving his estate to his wife in trust for herself & children - the last will found defective, the first will was held to be revoked for this substantial reason - Doug 35.

There is one case in which after the will had been declared to be revoked the decision was reversed - as when a man devised all his property except a few legacies to a lady and afterwards married her this was held no revocation - 1 Wils -

It is said that to make it a revocation there must be a complete disinherison. there are no decisions on this point although we have the dictum of a judge - the question is, Is that such a will as a reasonable man in dying circumstances would make. Powr 560. Doug. 38. Bradyll Cubit -

A worthy Bachelor made a will giving a valuable charity, then married & settled an absolute estate upon his wife & daughter, at death he made a codicil confirming the legacy but scratched it out saying "this for whom it will tell all about it" the presumption arising from his scratching out the codicil is rebutted by his suspicions see Doug. 30. -

A man made a will & gave his estate to his intended

and then married her. had a daughter. made a codicil giving her £1000. had another daughter. died & had a posthumous son. this is a tough case as it appears to me, but such wills as after made we cannot be justified in pronouncing it revoked—

Justice Buller observes in Doug. 40. That implied revocation must depend on the circumstances at the time of the testators death—

A man made a will and a posthumous child was born to him. the estate had been given away among strangers, he had made a decent provision for his wife but did not know at the time of his death that she was with child. it was held to be a revocation.— Here then is no change of intention but of circumstances— the above cases suppose a child born— but suppose a man had during away all his property. then married a woman who brot him a genteel income of personal property. had no children & he died. & suppose too he was remarkably fond of his wife. I should suppose the will ought to be revoked. for he certainly could not intend to leave her entirely without provision—

It appears to me to be correct to say that it is no matter what the case is, if of such kind as to furnish proof that he would not have made such a will on his dying bed—

Even in cases of insanity the Eng. Judges are said to have acted very much — as when a man made a will, & became insane, some of the legacies were revised. yet the law in such cases is absolute that the will must stand— 2 Co. 61. a. b. 1 Vern 105. Pow. Dev. 564. —

I know a case once of a man making will in which he gave his real estate to his sons & his personal estate to his daughters. the personal was of about half the value of the real — the devisor was struck with the palsy and lingered under it seven years during which time the personal estate was expended & nearly so. the sons could have held the whole of the real property but they generously if it may be called so. divided with the daughters —

Powell observes. P.P. 557. that the presumption of a change of the testators intent as to the disposition of his property being an equity arising out of the particular circumstances of each case it may like every other presumption be rebutted by any kind of evidence, parol or written — see also Doug. 31 —

I am now to speak of implied revocations or other grounds / When there appeared a manifest intention to revoke the first will. but the means used were in themselves insufficient by some attending circumstances. the first is notwithstanding revoked — 1 Roll 614. Pow. 609. as when a second will made a new disposition of the same property but was void in some respect or other as the devisee being a papist which before the year 80 would have destroyed it will. yet the first is said is revoked — But are we correct in saying in this case that devisor means the estate to go to the heir at law if the second devisee did not take? would he have revoked the first will if he knew that the second devisee could not have taken? — It is said that the intent in law to take the estate from the first devisee revokes the first will.

But is not this the english of it that if the second cannot take the first shall —

A devises to B. his manor of Dale and a lease for years afterwards covenants with C. to settle the same lands on his daughter whom A married. — A power of attorney was executed for making the settlement but A died before that was done. the Courts held it a revocation from intention to alter. Pow. 606 Moore 429. Ca. 599 Pol. 108. 1 Roll 615. & vid 1 Bl. Rep. 349. 3 Atk 72. 3.

A devised land to B & then conveyed the same land by feoffment to C. the tenant never attorned to C. so that he could not hold but the feoffment revoked the will. 1 Roll 615. Pow. 606.

If A devise to B. & then convey by bargain & sale to C. although C. does not get it enrolled soon enough to hold yet it works a revocation of the will Pow. 607. 1 Roll 615. Vy 178. 180

~~A~~ C. L. If A devise to B. but afterwards devise by deed to C. altering C. could not hold. yet the will was revoked 1 Roll 615 — All these decisions are on questionable grounds I think but so is the law. But if the intention in the case is plainly not to revoke the law is that it shall not revoke. as when the devisor said he did not mean to hurt his will — or that he would not take it away from B unless C could have it —

Instances occur in the books in which the latter conveyance fails from incapacity of devisee yet it amounts to a revocation. As when after a devise is made the devisor conveys to the poor of a parish, to a prophet to parishioners No these are

had commencement either by deed or devise upto they are good revocations. Powr. 609. 1 Roll. 614. 2 Eq. Ca. Ab. 359. 1 Br. Par. Ca 450 10 Mod. 287. 1 P. Wms 342. Law 168

So in case of a devise and devised away what title he had & afterwards made a bill of sale to his wife tho the bill in itself was void yet it revoked the will 3 Atk 72. as far as to the personal property - Powr 610.

The next class of cases goes upon the ground of alteration & how then is no reference to the intention it is a departure from or exception to the general rule - A made a will. then sold the land devised & afterwards took a deed back this was held to be a revocation Powr. 567. Roll 616

A devised to B. and then conveyed the land in trust to C for his own (A's) use. and notwithstanding the Statute prevented the estate vesting it was determined to be a revocation 1 Roll 615. 1 Vez 440. 7 Br. Par. Ca 177. Powr. 567.

There are cases in the books where an alteration although for the very purpose of giving effect to the devise revokes the will - A devised an estate tail to B. and as he intended B should take an estate in fee he afterwards docked the entailment - here the estate was altered and the will revoked 3 Law 108. 3 P. Wms 163. Powr. 580.

This principle has been carried to a most extraordinary length - A owning an estate tail & wishing B. should take it in fee he connected with B. to dock. he then devised the estate to B & afterwards docked the entailment this was decided to be a revocation 1 Roll 614. Powr 581.

If in the course of the operation. the devisor is in

as of a new purchase. the will is revoked the mere intent to alter operating as a revocation in law and not as a revocation by the party. Powr. 582. 2 Atk. 579.

A devises Blackacre to B. but supposing he had nothing but an estate tail he docks - as he really before had the power docking it was perfectly merely nugatory yet it was held to be a revocation 3 Atk 803. Powr. 582. 3.-

This is the only spot in the law of devise where the intention if lawful is not followed. An actual alienation of the estate without any reference to intention revokes a devise. Powr. 393.

The moment you leave the courts of law the rule changes. In Equity any alienation of the estate without intention to revoke will not be considered as a revocation. A contracts with B. for certain lands and then devises those lands to C. and then B. conveys the bargained land to A. this not revoke the devise - Chancery considers the thing agreed to be done as done & will compel a specific performance - the land was considered as A's from the time of executing the contract. 1 Veg 440.

A mortgages his estate in fee & then devises it to his son. He afterwards pays up the debt and takes back the fee this is no revocation - 1 Wils 311. 3 P Wms 170. 2 Vern 679. Powr. 599.

So a deed of partition after a devise of an undivided share between coparceners or tenants in common is no revocation if the conveyance was for no other purpose than partition. Powr 603. Ld Ray. 240

Again A devises blackacre to B. & mortgages it to C for 8000. here the estate is altered & the legal title is now in C. & dies but the will is not revoked in toto - it is only a revocation

pro tanto and always so viewed in Equity since this jurisdiction over mortgages has been established — Pre Cha. 514. Pow. 614. 615. 1 Vern 329. 2 Ch Rep 154. 1 Salk 158. 3 Atk 805. 2 Ld Ray 968.

A devised to B without Bs knowledge & finding his personal estate insufficient to pay his debts he conveyed the land to B. to pay a debt considerable less than the value of the land. the court held this only a revocation pro tanto. & if the conveyance for that purpose had been to a stranger the residuum would have been a resulting trust in his hands. for B 2 Atk. 273. Pow. 619. Pre. Cha. 32.

So if a devisor abridge the quantity of interest he has disposed of by will - it only a revocation pro tanto. - as when A devised in fee to B. & afterwards leased to C for the life of C it is only a revocation pro tanto. 2 Roll. 616. Cro. El. 23. Pow. 624. 5.

It is said that if a lease be made to the devisee to commence on the death of the devisor it is a revocation in toto. As when A devises to B. & then conveys to B. to commence on the death of A. Pow 626. Cro El. 249.

Then is such a thing as a revocation by a stranger for it is necessary to a valid devise in Eng & in two of the States that the devisor be seized at the time of his death so that a disseisin by a stranger ruins a devise unless the devisor reenters before he dies — 1 Roll. 616. Pow 611

If however the disseisin is by fraud to destroy the devise it is of no avail — as when a man proposed to give his personal estate to the eldest son & the real to the youngest. his sons were pleased with the proposition & the will made ac

cordingly— the eldest then took possession of a valuable part of the farm & disposed his father. this was palpable fraud & no revocation — for fraud said Judge Reeves is of no effect at all when it goes to do mischief. Pow. 611. 1 Eq. Ca. Abg 174 —

I have now considered the 2d. revocation and have made a few observations to make respecting the Eng. Stat of revocations — this Stat. has been copied by several indeed many of the States. where it has not & nothing similar to it is enacted the C.L. still prevails — That Stat. declares that all wills shall stand except it be burnt cancelled torn or obliterated by testator or by his direction with animo revocandi — or except it be altered by some other will or codicil in writing, or other writing signed by the testator in the presence of three or more witnesses — With respect to cancelling &c the law is the same now as it was before the Statute — the quo animo must be proved & as when the devisor mistook the ink for the sand & very much defaced the instrument — the will was kept & held good Pow. 633. Lewis 52, 1 P. Wms 345. The rule is the same when the wrong will is cancelled by mistake —

So when a man, with intent to burn threw his will into the fire, it was taken out but little burnt yet it was held a revocation. parol evidence is admitted in such cases. 3 Wils 508. Pow 634, 2 Bl. Rep. 1043 —

It is not uncommon to make duplicates of a will, if one of them is destroyed by the testator, it destroys the other also Pow 637. Comyns Rep. 253. 2 Vern 742.

A testator may tear to a will with intent to revoke

and stile it will not amount to a revocation. as when one did it with reference to some fact which he misconceived. As when one commenced tearing up a will supposing that the second one was finished - but desisted & stopped his sorrow when he understood it was not. Pow 637. 1 Eq Ca abg 409.

By Ed. a will could be revoked by parol but you will observe that this Statute alters the common law. in no case can a will be thus revoked. the word will is construed in the same manner here as in the devising clause. so that if a devising will or codicil is made expressly revoking the former will. yet if the ... land devised can not pass either thro' alienation, incapacity, informality or any other cause - it shall not revoke the former will as it is not in legal language a "will or codicil". neither will it revoke the former will although it has all the requisites of the writing spoken of in this Statute. if it is not as I observed before a good devising will. - Pow 631. 3 Mod 258. 1 Show. 89. Carth 79. 2 Atk 272. 1 P Wms 343. Pre. Ca. 459

The execution of the writing above spoken of is different from that of will in this, that it must be signed in the presence of three or more witnesses by the testator. — must be actually done in their presence, an acknowledgment that it is his hand writing is not enough. 3 Ves. 86. Pow. 646.

It is said a will of personal property only & with no reference to real except to revoke a former devising, if executed as a revoking will is required to be, will be a good revocation Pow 629.

Leasehold estates says, Sugden Revo, subsequently purchased, will not pass, as the accounted personal property, and this is because they partake of the identity & certainty of real property—

Lord Chan. Parker in the case of Wind v Jekyl et al. 1 P Wms 575 that all after purchased leaseholds will pass— see also Powe. 189. 3 P Wms 169 Salk 237

Republication of Wills

A devise if not destroyed in substance. although revoked may be set up again by republication. and as at CL a will might be revoked by parol. so it might be republished by parol. Pow. 652

In some cases the republication of a will although it has not been revoked has great effect — as to, keep after purchased lands. - see. 1 Vez 437 Com. 381. 9 Mod. 78. 1 Vez 442. Pow. 674 —

The will speaks from the day of republication and is renewed so that its effects are the same as if it had been originally written on the day of republication Pow. 674. 676 —

As to devise of leasehold estates the law of republication remains as it was before the Stat. of Frauds. Pow. 667 586 to 593. 2 Atk 599. Pow 189. Salk 237

At C.L. words spoken with animo de were sufficient for all the purposes of republication. Pow 652. But since the Statute of frauds there can be no republication by parol. Pow. 664

The form of repub is to take the will in hand & call witnesses to hear the acknowledgement of it as the last will. 2 Atk 549. 1 Vez 240. 9 Mod 78 Judge Rawe observed that there is no necessity for the witnesses to sign. if the will was originally well executed but they may keep it in their possession

The question whether a codicil amounts to a republication has been much agitated. see Pow. 658. 673 — It has however been at last determined that. a codicil on any paper annexed to the will or not — of real or personal property acknowledging the will ~~&~~ or not mentioning it properly executed amounts to a republication. 1 Vez 493. 441. 485. Comp. 158. Pow 668. 657. 3 Ves 554

A republication to be good must be in writing according to the
Stat of Frauds & perjuries.—

Leasehold estates are considered as personal property & by bk might be devised by parol. so might there have been a republication by a parol. Pow. 667. but words spoken not with the animo rep. would not amount to republication Pow. 667.

It has been contended that there could be no parol republication to pass after purchased lands 3 Cha. Rep. 90. 2 Vern 621. 1 Vez 489. 1 Bur. 552.

The devising clause of the Statute of frauds can have no effect upon estates for years—

In an original will it was written "I give &c all the lease hold estates I now hold" the lease was renewed it was held that the subject matter of the devise was gone & that the republication which followed did not mend it. red per Cur. (Pow.) the repub. makes the word now mean the date of republication. Pow 684. 3 Atk 176. 2 Atk. 599—

A person not in esse at the time of devise may take under a republication — as where the devisor devised to his son Jo. he died & the devisor afterwards had another son whom he named Jo. this one took under the republication — Pow. 675 1 P. Wms 275 5 Co. Rep. 68. 9—

In wills the word son is often construed to mean grand son. particularly if the devisor had no son. Pow. 678. 2 Vern 106. 3 Mod 315. 2 Show 63—

A will acquires no new qualities by republication. which can only be an original subject. a devise says all Pawel. not properly executed as it is in caption. will not be helped by a codicil although that be executed pursuant to the Statute of frauds. Pow. 681. Prec Cha. 270. 2 Vern 597—

But we must be careful to distinguish cases of this nature in which the will & codicil operate as distinct instruments from those in which the writings are but one instrument although made at different times & concerning different property. the attestation of the latter gives validity to the whole. Pow. 682 1 Burr 524.

If a will be made by a minor & republished when he comes of age it is good. Pow. 686. The acts of a minor are not void acts so that you cannot give life to them they are only voidable.

There is no difference between republication in Laws & republication in Equity. Pow. 687. Comyn. 132.

Other ways by which a devise may be conveyed in addition to those already mentioned

If a will is so uncertain that you cannot understand it, it is void. Judges can put a construction upon the words but they cannot guess at its meaning.

This uncertainty may arise from a loose description of the property devised or of the devisee — Pow. 412. 418. as "to the right heirs of the testators name & posterity paternal & "kin alike" Hob. 34. Moore 860. Pow. 411. as devise to "one of the sons of S. S." he having several is void. Pow. 418. 2 Vern 624. — "so to a devise" to two of the best men of est is void. Pow. 418. I will notice this subject when I come to speak of parol testimony.

When a will is unintelligible on the face of it, it is void. A will may appear on the face of it intelligible but may become ambiguous by circumstances arising after its execution

In which case parol testimony may be introduced to prove the intent of the devisor — As in case of a devise to his John generally when he had two son of that name — to [illegible] devise his manor of Dale & it turn out that he had three or four manors answering that description, In this case if no parol or other testimony of the testators intent could be adduced to render the devise certain — the will would be void. Pow 424. 5 Co. 68 J

But if the devise had been of one of the testators manors of Dale. then the devisee should have had his choice among them Pow. 425. Bac. Mast. 188 ——

A devise may become inoperative when the intent of the testator is opposed to the policy of the law —

If a devise be made of a fee simple. on condition that the devisee shall not alien. — the devisee takes the land discharged of the condition.

So a devise of an estate tail conditions not to bock is in vain for the law will not admit of a perpetuity

although you can devise an estate to A & the heirs of his body — you cannot limit it to his male generally the devisee would take in fee

A devise of land discharged of dower does not bar the right of the widow.

Personal property cannot be entailed by will or in any other way —

A devise may become inoperative by a refusal of the devisee to accept as on account of the legacy being

so heavily loaded with legacies. 1 Pow. 443. The refusal must be made within a reasonable time or the Court considers it accepted.—

A devise may become inoperative by the devisee performing in his life time after the execution of the devise those things which he directed to be done in the devise Pow. 470. 1 Wms 5.

A devise may be defeated by debts by operation of law.

Suppose P.S. devises away his property in lands to divers persons and his personal property is not sufficient to pay his debts after the legacies are paid.— If to A. there was a legacy of a horse to B of a yoke of cattle. the Exr can take such property as he pleases to apply for payment of debts & if he deprives one legatee unduly, has he no remedy.— If the legacies were pecuniary the rule is that they abate proportionably— but there has been much dispute in the case of specific legacies— It would seem that the latt legatees should hold in Equity as Trustees for A whose horse was taken by the Exr.— otherwise it would be giving too much power to the Executor.—

Of the right which a man has to confer a power upon others to dispose of his estate after his death.—

It has never been doubted but that a man has power to authorize another to dispose of his lands during his life he himself being made a party to the conveyance. It was not at first supposed that he could confer a power of this kind to take effect after his death but it is now admitted that he can authorize an Atty either to sell or to dispose of the property by devise— & can confer this power at his pleasure by deed or by will—

This power enables men to pay their debts & is most commonly used for that purpose as by C.L. real estate was not liable for simple contract debts — Besides a man might think that one part of his estate was more valuable for his children than another —

Power of this kind is most commonly given to Exrs who in the execution of it act as Trustees not as Executors — the amount of sales is equitable assets in their hands with which the debts are to be paid pari passu —

Sometimes this power is merely naked authority and sometimes it is coupled with an interest — If the devise says my Exrs shall or may sell a power to sell is given but it is a mere naked power: a conveyance made by such Exrs would be valid. Cro. Eliz. 382. Comp. 464. Co. Lit. 113

If the devisor says. I devise to my Exrs to sell & it is said to be an authority coupled with an interest. The legal title would be in the Exrs & they would be intitled to the rents & profits in the other case they would belong to the heir untill the sale & conveyance — when the purchaser is in by the devise Pow. 293.

Sedgr Powr doubts whether at this time of day such a distinction would be made — as it is merely nominal. See Co. Lit. 236. n. 1. Bac. Co. Lit. 181. b. note 3. Pow. 302 —

A mere naked power is nothing more or less than a power of attorney, & is governed by the rules of such instruments, if it given to two as the rule is to construe them strictly — a conveyance by one of them would not be good — and if one of them dies or refuses to act the power is defeated, unless indeed they continue

yancy is provided for in the power — Pow 295 —

If the Ex^rs should decease to the heir it would be void. Pow 294. When the Ex^rs take the power coupled with the interest the have the legal title, & on the death of one it survives to the other Pow 296 —

If a man gives power to his son in law to sell a joint conveyance by all only would be good — if it had been to his son in law without counting them. a conveyance by more than one i.e. to make it plural, would be good. — Cro Eliz 20. 524 — So decided as "to my Ex^rs". Sed. Qu?

Suppose a legacy they given, could two of the sons divide? says S. Rowe. —

Tho' where a person will not undertake the trust can Chan. compel him to? — you cannot compel one to take a trust. but if for a length of time they do nothing either as to performing the trust or refusing it. the court will consider this silence or non dissent as a presumption of the trust and will compell a performance —

There is no need of express assent to consummate a devise but a dissent destroys it. — We hear much of implied assent of legacies — there is no such thing — an infant or idiot can take by devise. and it cannot be said that they give an implied assent — Qu. would a dissent by them destroy the devise?

If the appointee refuse to accept. — it stands the same as if the Testator had made no appointment. but only left his lands to be sold to pay his debts — and in such the Court commonly appoints the heir. if he will not accept. 1 Com. Trusts Law 304

Sometimes the land is devised to Ex^rs to maintain & edu-

cate the younger children – in such case they have an interest & the legal title – if they have they are trustees for the rents & profits – if it is a mere eligible to sell they have power to make a conveyance. 1 Vez 491.

When Trustees have unlimited power by the devise. Chr has assumed the power to see that their pleasure is not unreasonable. – As in the case where a man left considerable property to his wife to distribute to the children & she made the distribution so manifestly unequal as to leave some almost destitute the Court interfered.

Some observations with respect to the Statute of Uses as they relate to wills & devises –

There is some stat. similar to this in almost every State Before this was enacted when A conveyed to B. for the use of C. the Cestuique use – the courts would compel B. to pay over the rents & profits to C. or to let him in to the immediate enjoyment or to convey the land to C. – This state of things becoming very inconvenient. The Statute 27th Hen. 8 was enacted commonly called the Stat. of uses. which vested the land immediately in the use man – In those States where there is no such Stat. the use will remain separate –

This Statute was indeed negatory by a devising another trustee. thus. A conveyed to B for the use of C. in trust for D. From this source sprung that vast number of trust estates which are now to be found in Eng. And the courts of Chancery have built a noble system of jurisprudence on this foundation 2 Ld Ray 873. 1 Vern 79. 167. Powl 235.

A Feme may sue at law with out her husband for personal wrongs without control. Husband the first receives this as to malty. 1 P. Wms 126. 2 Vg. 518. 3 Atk 709 1 Vern 253 Vg. 190. 303. 1 Vern. 214. 1 Ch. Ca. 116.

1 Mod 211. 12 She may sue alone in action or as ex. without the the assent of husband. And. 92. Mor. 341. 2 East. 552.

It will be found in all cases that when a wife holds prop. exclusive of the husband she can sue at law & Eq. she might then sue in her personality. 1 Bro. Eq. L. 111 307 107 Dig. 2 Lib. 68

By means of the Statute of Uses a man can convey directly to his wife — as to T. A. for the use of his wife. formerly the method was now circuitous as A. S. deeded to T. A. and T. A to the wife of A. S. this is now the practice in Conv.

When there is a Stat. similar to that of Hen. 8. a devise to B for the use of C. would be perfectly nugatory, but a devise to B for the use of C. in trust for D would be effectual — upon this Hen. 8 gave the Cestui Trust Estate now no property —

Who may devise? or rather who may not? —

All persons were incapable of devising real property before the Statute of wills except in a few places as fixed by custom —

Personal property could be devised by all persons. this Stat. gave power to all persons to devise real property then the Stat of the 34th excepted idiots & lunatics, whose incapacity is to be tried by jury. Feme covert were also incapable as were also minors — by this Stat minority was limited to 21.

I do not suppose that persons wanting discretion could make a test. absent by C. L. but Feme covert Trust could do with this exception the Stat. undoubtedly meant to place real property on the same footing as to devise on the same footing as personal was before the Stat —

In a question of idiocy it is not enough that a man be able to answer ordinary questions as the welfare of the family &c. but must have discretion enough to conduct ordinary business. & it must be left to the jury to determine and so is the question of lunacy. —

As to the disability of a Prince court to devise see Peter. Baron de Finch — Rec. Dom. Rel —

Durst — If the testator be under duress at the time of executing the devise it is void — this principle is extended further in the law of devise than in that of deeds contracts &c — in ordinary cases the duress must be by imprisonment threats & fear of loss of life or limbs to make void the instrument but a testator must be left entirely at his ease to act his own pleasure — If he is importuned or teased in such manner as to give way to it at last the will must be set aside — Thus are more wills set aside for this than for any other cause — Pow. 170. 1. 3 Ch. Ca. 103. 1 Ch. R. 66

A man about to make his will called in his wife to consult she differed from him & but him to terms — the will was executed but the testator recovered and lived 10 years in this time he told his atty that he intended the will should stand — after his death the will was established — the length of time that elapsed between the execution of the will & his death would have established it says L. Rawe — If he had died at the time of execution it would have been set aside on proof of the facts that he executed it for the sake of his own quiet —

Mr Powell says. If either of the last mentioned disabilities viz infancy non-sane memory idiocy coercion or duress exist at the inception of the will it will be absolutely void. although the disability be actually removed before the consummation thereof by the death of the devisor Pow. 172 11 Mod 157. 2 Eq Ca. Abg? 357.

Fraud in the execution of an instrument always makes it void whether it is a deed or a will or any thing else. But fraud in the conception will not make a deed void at law. that it would in Chy but it will destroy a will at law upon a plea that this is no will. — for no need of going to Chy.
1 P.W. 568. 2 Vy. 183. 2 Atk. 324. 424. 3. Bro P. Ca. 358. Pun. 423.

In Eng & in most of the States a devisor must be seised of the lands in order to give a title to them by devise. Pow. 183.

Legal or equitable seisin is sufficient. first meaning actual possession the other a title to the land in question by a covenant or contract which Equity will enforce specifically on application — Leases are no impediment as the lessor & lessee seised on the same things & so do not prevent a devise of the remainder — but if one holds adversely against the devisor he is disseised and cannot devise — Pow. 208.

Who may be devisees.

You can hardly find a person who cannot. — all persons may take by devise who are not expressly disqualified by statute —

A devise to one in ventre sa mere is a good devise Pow 325 328. 7 Mod 8. q. When the devise was per verba de futuro, then seems to have been no doubt — But if the devise was given per verba de presenti it was once doubted whether the devise was good — The courts have now determined the doubts upon the ground that such a devise is in its own nature, a devise de futuro — Pow. 329. 7 Wils. 105 Became Rem. 332 to 428 —

As to coverture, it is now no question, a man may devise directly to his wife — formerly it was held not for they were one conjuncti. — The disposition of the husband will prevent the wifes taking by the devise unless indeed the devise is limited to take effect after his death in which case he could not prevent her taking — And when he had by law a right to be

pacts. Equity would interpose to prevent a husband from prejudicing his wife Pow. 315.—

It is said that an Alien cannot be a devisee— this is incorrect— they can take under to devise & will hold until office found, when it is forfeited.— if he dies possessed (see Brown vs Holt) the land goes to the King, for an alien can have no heirs, except indeed he is naturalized & has children born afterwards. Bl. Com. 2 Leg. Pow. 310. 2 Vez 360.—

The law is the same when an alien is in by deed as a purchaser— I should think the proper way to consider this subject would be, to call the purchase void ab initio, and oblige the seller to pay back the consideration and not to defend the action according to law.—

It is a maxim in law that a Bastard is nullius filius. Has no father & mother— & in abhorrence to it, some thing very ridiculous has been advanced. as that he did not belong to his mother & could not inherit from her— could gain no settlement by the mother— &c— by the same course of reasoning you can prove that he never was born—

There may be policy in this as to prevent incest in families & so far it is reasonable—

An illegitimate child can have no relation to inherit except of his own body neither can he inherit from any one except by particular Statute—

A Bastard may take by grant or devise when he has gained a name by time & reputation Pow. 319. 338

If a devise be to the "eldest son of A" no notice will

[a] Notwithstanding this general rule, in cases if the bastard is not named, or indeed, if he is misnamed, if a person is clearly made out by averment to be the person meant, & there could be no other to whom it might be applied, the devise to him is good. Pow. 498. 1 Atk. 410. Finch 403. 2. P. Wms 142.

be taken of ats illegitimate children Parr. 339. 345.

A devise to "the issue of P. S. whether illegitimate or not" would not hold. auth. sup. tho it seems that to enable a bastard to take, he must have obtained a name by reputation & that name must be used in the convey ance. 2 / P Wms 529. Co. Litt. 3b (Harr notes)

The Chancellor observed that anything which amts to a designatio personae is sufficient for a devise to take / ett 410.

So. we see that an estate cannot be granted or devised to unborn illegitimate children, but to unborn legitimate children it may be if not extended so far as to create a perpetuity - since a fee may be made to commence in future by devise: at what length I shall observe when I get upon Executory Devises. The Bastard must have gained a name - so that although a remainder may be limited to an unborn legitimate it cannot to an unborn illegitimate.

In deeds a fee must commence in presenti & if you convey to the eldest son of J. S. when J. S. has no son nothing passes - but you can grant to J. S. for life & to his son in fee.

A devise may be contingent as if to A on his marrying B & the property passes instantly on the happening of the event - in the mean time it is in the heir.

A devise may be uncertain as to the devisee as if an estate was given to the son of J. S. who is first married - here the happy man takes both wife & estate at the

same instant. — By a grant this could not be done. —

It was once questioned whether a devisee could take by description without being named. but there is no doubt but what he could if there was but one person answering the description. — so indeed it would be good if there were several of that description & you could ascertain by parol testimony which was meant. —

A devise to a mans relations would be good and they will take according to this degree in the Statute of Distributions. — But it will be said this is taking by descent not by devise — but you will observe that in descents the estate goes to the next of kin & their legal representatives. but under such a will as the one supposed the next of kin take exclusively representation is not admitted. there in the first degree exclude all the second & so on — This Powell doubts where the devise is of land. merely Pow. 351. 2 — 1 Ves 84. 1 Atk. 759. 761.

Any words which describe the person understandingly is sufficient. Pow 338. — But a general description which will include a multitude will not answer —

When a devise is made to P.P. & his heirs. the word heirs is a word of limitation in its legal sense — if it is to the heirs of P.P. who is still living, it either means nothing for never heir apparent or it is too indefinite meaning those who shall happen to be his heirs — unless perhaps it means some distinct person as the heir apparent and you can be new born particular person was meant and the word heir was not used as a word of limitation. from the circumstances of the family it may be good.

So you see it extends upon the circumstances of the family as well as upon the words of the will. Dow. 858 — 1 Ld. Ca. 203. 1 Vent. 332. 372. 2 Vent. 311. as to the word living as a description known see Dow. 480 —

Of the introduction of Parol Testimony

I shall point out the law generally & then in some manner simplify —

Then is a rule of general if not universal application to all kinds of written contracts deeds & devises viz. That parol testimony (of declarations intention expressed in deeds) is not to be admitted to explain, enlarge, contract or restrain the language used therein, or to give it any import or make it any way different from the will itself Dow. 487. 5 Co. 68. 2 Vern 98. 2 P. Wms 315. 1 Vez 189. 2 Atk 218 373 Dow. 345 —

The rules of law in relation to the introduction of parol testimony are very interesting & important & require your particular attention. for there are but few points in the law in which young practitioners are so often disappointed as in this one —

There are cases in which parol testimony would be admitted in case of a will but refused in case of a deed. but the general rule is the rule referable to them all —

Nothing is so uncertain as the words a man has used what he said &c. & there a thousand concurrent circumstances to render testimony of that kind suspicious. —

In what case then is parol proof to be admitted? — Deeds or wills so far as respects the Stat of Frauds & Perjuries in relation to testimony: You can be admitted by parol testimony to prove a

set of facts from which conclusions inferences may be drawn by which the meaning of the writing can be clearly understood. As when A claims that the deed the apparently absolute was a deed of defeasance to B. Now the Stat. forbids the introduction of parol testimony to contradict the terms of a written agreement but in this case it can be admitted prove that he has been in possession now 10 yrs since the deed was delivered & has not accounted for the rents & profits — that he borrowed money of B. gave his note for it. and that B came every year for the Int.t — These are facts which are invariable find accompanying mortgages & are sufficient to prove that the sale was not absolute. It is not necessary for it to produce a written condition for this is but a rule of evidence & if you can prove such facts without the witness swearing directly in the teeth of the contract Pow 477. 480. &c —

So too in analogy to the law as feeling directs as to that part of them that consists of matter of fact. the law respecting wills as to the same point. Omits of agreement by the party where & only where the matter averred stands not with the words of the will. Pow 484. 8. 8 Rep. 155. 2 P.W.s 137. 1 Vez 231. . As when £1000 was given "to the four children of her cousin E.B." E.B. had six but parol testimony was introduced to shew that her four children by her last husband were the ones intended. — but not as to another legacy to the children only this in the same will 2 Vez. 218

A man although he has omitted to say "value rec.d" in a note, may in an act.n on it prove that he sold Def.t a horse at that time &c — but if he had stated some

consideration of no consequence. he would not have been admitted to prove about the horse.—

There are two kinds of ambiguities in a will called latent & patent.

Latent ambiguity are those arising intirely from something extrinsic the will & may in all cases be explained by parol testimony relating to some extraneous fact. As, when a man devises land to his son Thomas when he has two sons of that name 5 Rep. 68b. so too in a devise of blk acre when he had two farms called blk acre — 8 Rep 155. Pow. 288. so to one charity school in Kent when there were two there answering the description In this several cases it was plainly the testators intention to devise to some one whom he supposed well described by the will.— & parol is admitted to prove which he meant the matter arises totally extraneous which makes the ambiguity.— So when the father devised to ch. B. & C. several each separately & specifically without noticing D his youngest favourite boy. Judge Reeve said that parol might be admitted on the grounds of insanity, (a very weak reason indeed unless meant totally to destroy the will) 8 Co 155. 2 P. Wms 137.

In all cases of ambiguity extrinsic proof may be admitted to shew the true state of extraneous facts and the state of the testators mind.

Patent ambiguities. or construction of sentences cannot never be explained by parol testimony.— but the meaning of words as a provincialism peculiar names &c may be

explained by parol. 2 Vern 624.

When the ambiguity is so great on the face of the will that no opinion can be formed of the meaning & no sense can be made of it - parol proof cannot be admitted & the will must fall. as "to devise to one of the children of S.S." when he had several, no one could possibly tell which one was intended & parol proof cannot be admitted to explain the intention intire — 2 Vern 624. 3 Ch. Rep 98 2 Bulstrode 180. 1 Salk 7. 6 Mod 199.

In the two last cases mentioned we have a case of a devise to A.B. when the happened to be two of the name, all were proved that devisor knew both one of them & that one took. Pow. 292

Further Although the rule respecting parol testimony is nearly the same in deeds as wills. — in some cases they are different - as when a grant is to a man by a wrong name it is ill, but a devise thus made is good, if the description accompanying the name rendered it certain and the circumstances of the devisor & devisee may be proved by parol to explain the meaning Pow 298. 9. so where a niece was made devisee by a nickname as the was no other one answering the description - if there had been, the books say it would have been insuperable tho I seem to it. Pow. 299. 2 Atk 240. 1 Atk 210. 2 P Wms 142. 2 Eq Ca Abrd. 215. 18

But if the name is mistaken some part of description is indispensable as to "my nephew Robt. Nunn" the name was Wm. the word nephew however saved the legacy Pow 500. 2 Vez 217. 18.

The court will not by averment supply any thing that was not before written as to fill a blank name Pow. 501

All words of equivocal import are used as parol averment will be admitted to explain them. as in the case of "senior puer" - Pow. 496. 1 Wils 674

The circumstances of a man's family may create an ambiguity - as if a devise is to a man & his children - the term children is a word of purchase. if he had children, it would go to him & them is common. if not, it would be a word of limitation & the estate would go to him in tail - now parol testimony may be admitted to shew whether he has children or not. — Pow. 504. 5. 6 Rep 16

Before the Stat. by the word estate nothing but an estate for life would pass in a deed without the words heirs - but when that introduced the practice of making only the intention of the testator was followed

the word estate meant the thing itself and nothing more originally — but it is now considered as meaning one's interest in that thing. and it is now settled that a devise of all one's estate will as it terminis pass one estate in fee. altho this is not the case in deeds. — parol testimony being admitted to prove circumstances such as shew that to be the testators intention. — as in case the devise is loaded with the payt of debts & legacies amounting to more than the value of the personal property or of a life estate in the premises

so that if from all these circumstances it can be made to appear that the testator intended the devisee to take a longer estate than for life. he will take a longer one.

In all these cases where equivocal terms are used parol testimony will be admitted of circumstances which may make clear the intention of the testator.

Fourthly. Words that are not equivocal nor attended with any apparent ambiguity may when applied to the testators property become so, and accounts are generally admitted respecting facts, that may throw light on the subject as the "state of testators property"

as in the case of the Bell tavern. Dow 509. where B. devised all his estate &c in the house called the Bell tavern to J.B. B was seized of remainder in fee of that house & J.B. was tenant in tail — the facts was sufficient to show that the testatrix intended to pass the reversion in fee to the when J.B.'s entailment was spent for want of issue the fee would vest in his heir — the parol testimony here plainly establishing the point that testatrix meant to give all she had to the reversion. altho the words used meant abbarently an estate for life — Dow 509. 1 Salk 234. 2 Ld. Ray 831. 1 Br. Par. Ca. 108.

So too when testatrix gave to Bt C. £500 each, to D £200, to A £100. stock in the long annuities to be transfer by her Exr and then devised the residue. — parol testimony was admitted to explain the state of the testatrix property, by which it appeared that she had but £120 P. annum in the long annuities — this shews that the words of the will were used different from their usual meaning & that they were intended to convey to each only £100 principal — & so the court determined — the words were not equivocal or ambig-

words, yet if they were to be construed according to this plain signification it would make both the devise & the devise ridiculous. Powr. 514. Bl. Abr. 472.

It has been said that when a Devisor appoints his debts his Exrs the debt is released - but this is incorrect - it is assets in his hands and if the debts and legacies he need not distribute it -

A appoints B & C his Exrs and after payt of personal legacies & debts he gives the residuum to his Exrs. B and him £3000. Parol proof was admitted to shew that the debt was not released but was applied for the personal legacies - but parol proof to shew that it was intended to be released would not have been admitted & was denied, when offered to prove the contrary; Powr 522. 3. Talbt Abr 240. 2 Stra 261

According to the Eng. rule lands although devised to be sold for the payment of debts are not to be sold unless the personal property fails - But when a man possessed of large personal property devised his land to be sold, parol proof cannot be admitted to shew intention that contradicts the express words of the will by which it was plain that he meant to screen his personal property

The rule in Eng is that the Exrs is to have the residuum after payt of debts & legacies sometimes he gets a legacy for his trouble & pains - in such case the residuum is to be distributed the same as if there had been no will - as it appears that the Exrs is paid by the will & the testator did not mean he should have more this rule as to the legacy is an equitable construction of the testators intention in the will and parol proof will be admitted to shew

that Testator intends the Ex^r should have both the legacy & the residuum. because at C.L. the Ex^r is intitled to the residuum and parol testimony is always admissable to rebut an equitable construction but never to rebut a legal one. Powr. 524. 2^d Bac. 426.

Parol testimony can never be admitted to shew that Testator did not intend the residuum should go to the Ex^r for that would be rebutting a legal construction.

In this country the law respecting the residuum is different as the Ex^r is paid for his trouble. —

Powel says. Parol declaration even of a testator are likewise received in aid easy to rebut the constructive declarations of a trust, which is rebutting an equity for in such cases, the estate is in the devisee, & the averment is in support of the letter of the will. Pow. 524.

Judge Rawle in this case observes that Law & Cha have given different construction to the words of the same will. and where there is a case of this kind a legal & equitable construction. parol proof is always admissible to intend the equitable to make room for the legal one.

As in the county Gainsborough case. the heir brot a bill ag^t the Ex^x for personal property to reduce the mortgage on the real. — Parol proof was admitted to shew that the testator intended the Ex^r should have the personal property free of debts. notwithstanding that by the rules of the court the personal property was liable to be applied

2 Bl. 381. 502
Co. Li. 112 note
Coulsp. 152. 148

Bro. Eha. Mf. 30
389.

Slight circumstances have been proper to prevent [illegible] intention of the [illegible] Lov. 152. 1 P. Wms 424. note 1. 4 Cott.

to pay off the mortgage. Bow 525. 2 Vern. 253.

This you will remember is a very important rule for there are many cases in which a man's right depends intirely upon the equitable construction of a will and in such case parol testimony is always admitted to destroy it. there is no end of any thing else written. 2 Vern 677 2 Vern 252. Talbot. Ca. 79

Land was devised to B for the payment of debts & legacies - B was Exr. - the Equitable rule is that the residuum is a resulting trust in his hands for the heir - the legal construction that the residuum should go to the Exr. parol proof was admitted to shew that the testator intended B the Exr. should have it. for the estate is vested in him - Bow. 525 1 Cha. Ca. 196.

Repeated Legacies

By a repeated legacy I mean those legacies that are given twice in the same words to the same person.

The rule appears to be - that if two or more legacies are given in one instrument in totidem verbis to one & the same person they will not be accumulative - But if it be given in a separate instrument as a codicil or note of hand it will be accumulative on the ground of intention. for the Law presumes the testator knew what was in the will and intended both instruments should stand indeed parol testimony can by Law be admitted to prove the testators intention. Judge Reeve does not see the necessity of the introduction of parol testimony to explain the testators intention where the intention

is so clearly settled by the rule of law when the legacy is in the same and separate instruments.

I was engaged in a case for the devisee when the devisor had given a note of £700 to the devisee and afterwards the same sum in a will. We went on the ground of its being in two separate instruments and succeeded. We had parol testimony to prove testators intention but had no occasion for it. But if there two or more legacies and in the same instrument parol testimony cannot be admitted. 2 L^d Ray 1324. Br. Cha. 390. Pow. 526. 1 P Wms. 425.

You will observe that in all the foregoing cases the parol testimony is admitted on the ground of standing well with the will.

Upon the same principle of the evidence not being contradictory to the will, it has been held that parol proof may be brought in to shew that a devise is meant as in performance of a preceding agreem^t. For in such case the evidence is not made use of to construe the will, but to explain whether the one thing is a satisfaction for the other. Pow. 529. 2 Ves. 322.

Thus a man bound to provide for his wife being taken suddenly ill, he gave her a devise to the amount of the covenant. Question was whether these were not two provisions for the same thing. parol evidence was admitted to shew it was intended as performance of the covenant and such evidence stands well with the will. If the intention in such case be thus proved the widow is not bound to accept it.

but he cannot have the benefit of both the devise and consideration. Powr. 529. 2 Vern 323.

Parol evidence may be admitted in all cases to counteract fraud: because otherwise the rule excluding parol testimony generally would encourage what it was intended to prevent — Powr. 530. 2 Vern. 506.

Of admitting parol testimony to explain devises

Judge Reeve has made a synopsis of the foregoing doctrine on parol testimony for the use of his students of which the following is a copy verbatim et literatim —

I. Parol accounts of the testators declarations of his intention at the time of making the will are not admissible. for if those declarations are in conformity to the will. they are useless: and it is against the principles of the C. L. and opposed to the Stat of frauds, to admit them to explain, enlarge, diminish or rescind the language of the will. or give the words their usual meaning different from what they obviously import.

II. When there appears an ambiguity on the face of the will not arising from the use of equivocal words but from the construction of sentences contained in the will no parol proof of any kind is admissible to explain what the testator intended.

III. If an ambiguity arises out of the will as in the case of two devises of the same name or of two farms known by the same name and one only is devised. in this case parol proof of the testators intention not arising from his de-

lavations but to be inferred from the proof of certain facts is admissible

IV. When there is no ambiguity respecting the person who is intended as devisee, he being sufficiently described but called by a wrong name, averments may be made of the true name.

V. When an equivocal word is used relating to a person an averment may be made who was intended.

VI. When a word is used that is equivocal, because under some circumstances it is a word of purchase and the circumstances is a word of limitation, a parol averment of the circumstances of a mans family may be introduced.

VII. When an equivocal word is used as to the quantity of the property devised and thereby it becomes uncertain from the words of the will what quantity of property is devised, parol averments of the circumstances & state of property of the testator may be made to enable us thereby to discover what quantity of property the testator meant to devise.

VIII. Tho. the words are not equivocal yet if their technical meaning will render the devise ridiculous & the conduct of the devisor unreasonable, such meaning not according with the state of property of the devisor then this state of property may be averred for the purpose of producing such a conclusion of the words of the will, as will comport with the state of property tho contrary to their technical meaning.

IX. Parol evidence and even the parol declarations of the testator are admissible to assist an equity - It frequently happens -

that the construction of the words of a will in a court of law is different from the equitable construction in both. To construe the legal construction and thus to rebut the equitable one, parol testimony of the testators intention is admissible

X. In no case can parol proof be admitted to remove the legal construction and place in its room the equitable one.

XI. Parol testimony is never admissible unless the construction intended to be produced by it, stands well with the will

XII. Parol testimony is admissible to prove that a legacy was intended in satisfaction of a preceding agreement.—

Perhaps Judge R. might have added that parol testimony is in all cases admissible for the discovery of fraud & to counteract it.

Remainders & Executory Devises

These two kinds of estates agree in this that they are to be enjoyed in future.

An estate of this kind is not necessarily an executory devise if given by will. for a remainder may as well be given by will as by deed.

Whenever an estate is given less than a fee and upon that a fee is given this is a remainder whether given by deed or will.

The grantee in this case has parted with all his interest. and the grantee or devisee is invested with it as remainder man. immediately as the deed or devise takes effect.— This is called a vested remainder

There are also contingent remainders. & here it is a matter of uncertainty whether the remainder will ever vest. — This kind of remainders are called contingent because the person to take is dubious & uncertain: or because it will vest only on the happening of some uncertain event altho the person to take be ascertained.— Thus if an estate be given to A for life. remainder to his first son unborn in fee.— this is a contingent remainder & when the son is born the person is ascertained & it becomes a vested remainder.— So if a remainder be limited to A upon his marriage.— this is a contingent remainder depending upon an uncertain event.— & the remainder becomes vested as soon as it happens.—

But you will observe

that the remainder in both cases must vest during the continuance of the particular estate or so immediately that it determining there can be no intermediate. for if the person is not ascertained or the event does not take place either before or immediately on the determination of the precedent particular estate the remainder is void.

And you will observe further that a contingent remainder that amounts to a freehold cannot be limited on any thing less than a freehold. for as the freehold must vest somewhere as it is to leave the grantor. the particular tenant must be capable of holding it.

What then is an executory devise? It is an invention of the court to prevent the intention of the testator from being defeated by those maxims relative to contingent & vested remainders — An executory devise needs no particular estate to support it. and this is one thing which distinguishes it from remainders for a particular estate is absolutely necessary for without it there would be no remainder —

In those cases of executory devise the estate remains in the heir until the event takes place.

Whereas the estate given by will is good which would not be good by deed it is an executory devise.

A vested remainder may be limited on an estate for years or for life. But a contingent remainder

can only be limited on a freehold. — else the freehold would be in no one and this cannot be, for a lawyer is as much afraid of an abeyance as a philosopher is of a vacuum. there is no place to rest the seal of its fee. but if the particular estate be for life it is well enough.

another quality of good remainders is that they be not given in such manner as to create a perpetuity. You may give to A's son when he has none for this may happen within a reasonable time. and is called potentia propinqua. But you cannot give to A's grandson when he has no son this would be potentia remotissima. and the rule is the same in Eq. devises. for otherwise the owner of property would have too much authority over his estate to leave it answer the beneficial purposes intended by exchanges. — You may give to the unborn issue of any person in being. this is the Eng. rule and is considered L. in most of the states. — An estate cannot be given to an illegitimate child by way of remainder to the first child of A unborn if it should be an illegitimate, because it is said, having a bastard was a remote possibility. the true reason is that such child cannot take except by the name it acquires by reputation. — A vested remainder is an estate limited upon an estate for life or years with remainder in fee or in tail — a contingent remainder is when the particular estate is a life estate at least and to vest on the happening of some uncertain event. Here when the particular estate is determined before the contingency happens it can never vest. & the remainder is lost. with vested remainders it is not so. This has lead to an invention which may trouble you. an estate is given to A for life. remainder to B. to preserve contingent remainders

and remainder over to the unborn son of A so that if the par-
tate
-ties should die destroys the contingent remainder vests in B until
the child of A is born. The difference between remainder and
Ex. devise is that the latter require no particular estate to
support them and the same case is taken to prevent a perpetuity
in Ex. devise as in remainders. the first rule applicable to both
is that the estate must vest during a life in being. and it is no
matter how many remainders over there may be. an estate to com-
mence 500 years hence would only defeat itself for it must vest
during the life or not at all. — The rule has been extended by the
courts. for it was necessary or that so to convey to the son of A so
that he should take when he arrived at 21 yrs of age. so that
an estate may be given to vest during a life in being & 21
years after wards. for according to the old rule the contingent remain-
would be void. after this in two case it was extended nine
months beyond this. — this then is the extent — The rule has
been universally concurred in. — I have now explained to you one
distinction between remainder & Ex. devise. — A second is that by
a fee cannot be limited after a fee. for there is no remainder
after all is granted. by way of Ex. devise however this may be
done. but the remainder must be so limited as to vest during
a life in being or it is a perpetuity. — 2 Bl. 173. 6. 5. —
A third difference is that in a term for years a remainder can-
not be limited after the grant of an estate for life. because the husband
is greater than any term for years — it does not mean longer. but
by Ex. devise this may be done. — The statutes of several States have
destroyed the distinction between deed & will as means of conveyancing
& the invasion is a very reasonable one. When it exists the maxim as

important in its influence viz that a freehold cannot commence in future is done away. The Con Stat. says that all estates may be given by deed or will to any person in being or their immediate descendants but no further limitation is allowed. That a fee cannot by deed be limited after a fee see 10 Mod 422. 6 Co 40. 590. —

An estate is given to a man by will. in fee simple and if he dies without issue is given over in fee simple. — The question is what is meant by dying without issue? According to the legal technical definition of terms a man might die without issue 100 yrs after his death. and if this was considered the true signification of the phrase used in the conveyance the limitation would be ill either in a deed or will as creating a perpetuity. The real meaning, however as common sense would construe it, is a man dying without issue of his body living at the time of his death and when thus understood it is a good Estate devise. —
The Judge then related again the story of Duncan Mary field. —

Descents—

The States of N York & N Jersy have adopted the Eng. law of descents and most of our States have made the Stat 22d Chl. 2d the foundation of their laws on this subject. thus it the Eng. law for the distribution of personal property & provides that an intestates estate goes to his issue or their legal representations exclusively & if no issue to all next of kin & their legal representations. but not further than brothers & sisters children and thus if we know who are next of kin & who are legal representations we know how to distribute — see next page

When the old stock are some dead & some living then the children take what their fathers would have taken, (per stirpes) but if all the old stock are dead they all take per capita all alike this rule is the same in the descending line in all the States, as by the Stat of Charles 22d

But I.S. has left no children who is the next of kin under the Stat of Chs which directs the next of kin to take gave a right to the mother but the Stat of James referred her to the second rank with brothers and sisters in real property but not in personal, by which we are guided. The proximity of blood not the quantity directs the succession always gives those in equal degree of kin an equal share, so that grands being dead brothers & sisters of whole or half blood in suit — another branch of the Stat of Charles 2d only that it are brothers & sisters children, so that grand children cannot take when the children are any of the alive but if the children are all dead. the grd children all take alike per capita. — if part of the children are dead the grd children take per stirpes I.S. died — his brothers & sisters take the estate if some of them are dead their children would take what their parent would have taken (per stirpes) but when they are all dead their children take equally by capita — & if both of the children left children their children cannot take by representation until

all the old are dead — When all are dying or are dead.
The parents take but when they are dead the brothers & sisters of
D.S. & their respective children if some of the brothers & sisters are living they
will take by representation what their father or mother would
have taken, if all the brothers and sisters are dead their children
take equally per capita — The State draws up the children to the place
of the parent — but by the State generally adopted the right of representation
goes no further than to brothers & sisters children in the collateral
line. —

"next of kin" means the same in our statutes as in the
Eng. law for it was understood in a particular manner long
before the machine of the State in our country.

The object of our State has been to abolish the feudal prin-
ciples which governed in the Eng. law of descents as being repug-
nant to the spirit of a republican government. —

Addenda —

There is no need of explaining upon it means only children
grd children &c &c — In determining who are next of kin
in lineal line from progenitor to his father is one to grandfa-
thers — and to his children is one to his grd children two &
so on — And as to collaterals count in the same manner
to the common ancestor & then down to the collateral rela-
tive — If the rule were this to distribute to the next of kin on-
ly, there would be no difficulty for whoever sues take as next
of kin they take per capita. This computation is by the civil
Law & adopted in most of the States. & whereas there is a
word in Eng. Stat which our Stat does not mention we are
to define it by the Eng law — & the above rule is universal
in Eng. distributions — But the rule is to go to next of kin
& legal representatives of next of kin as far as brothers & sisters

A proper knowledge of the construction of the Eng Statute of distribution of personal property will I apprehend enable us to judge correctly respecting the descent of real property in most of the States of the Union for this Statute seems to have been made the basis on which the laws of those States have been formed respecting ancestry where a person seized of or having title to real property has died intestate. I believe it to be a sound principle that the terms used in our Statutes without any definition are to be explained in the same manner as the Eng Statutes understood them for it is a legislative axiom to that construction where no provision is made to the contrary.

2 No preference is given to males over females & if there had been no children the distribution must have been the same.—

children and as well in collateral as descending line.

The rest of the will always stands the more remote unless they take by representation when the stock lifts them up to the place of their father

Distribution to obtain the stock of 22 Gh 2 which respects personal property & the Statute of Canons alters only in respect to the mother — The following cases suppose the wife to be dead

1st. dies intestate leaving 3 children & ors. as. col. & all. relatives the 3 children A. B. & C. take equally & respectively

2d case the same only A was dead leaving children D & E. who will take 1/3 with B & C. per stirpes

3d case the same only B was dead leaving Fr. Sister D. E. & F take what their father would have taken by representation because some of the claimants are more remote than others.

4th the same only B was dead with B & C their children take per capita the old stock being removed they do not take by representation i.e. the children of A. B & C each equally —

5th case B & C were living & dead and issue of his children D. but A left C & L his B takes 1/3 — C 1/3. E the remaining one of A's & K & L together 1/6 it being what D would have taken if he was alive

6th case all children & grandchildren are all dead leaving an equal number of children in the whole 25 Gr. Gr. grandchildren are all in the same degree & take per capita the estate being divided into 25 equal parts

7th One of Gr. grand children was dead leaving M & N his children these children take 1/25 pt. the rule being that in descending lines representation goes on ad infinitum. in all these cases of sixth no preference is given to males and the posthumous child holds equally with the others — for the estate will immediately in the administrator — who does not distribute a share of a year. the law [illegible] to his duty & distributes after the expiration of 1 year after intestate's death —

8th. I. Said intestate without issue his relations living were his father Reuben. his grandfather Solomon. his mother Mary his g. grandfather Lothian. his brothers Thomas Stiles & John Rowe. his sister Sarah Stiley & the children of Thomas A & B. the child of Sarah C. the children of I. Rowe D. E. F. his uncles George Stiles & Edmund Stiley his father's brothers. & his aunt Alice Brown the sister of his mother Mary & G. the child of George H & I the children of Edmund J & L the children of Alice M the child of A. B & C the children of D. F the child of E. G. R. the children of G. I. J. & the children of E. M & N the children of O. P. — Lobo does the estate belong to? —

The whole estate goes to the father Reuben the next of kin for Money is degraded by Sex that — & it would bide if she could not hold. for it would not bring personal immediately in the husband. 9th But Reuben is dead & the Grand Father also then bring none now in the first degree then in the second will take there are Mary Tho.s Sarah & John Rowe who will take being brothers & sisters. Sons of kin not by representation the old stock being alive — 10th as the former only Tho.s is dead having A. B. who take Tho.s share by representation — the more remote take per stirpes. — so if Sarah had been dead her children &c 11th the same only all are now dead of the 2d degree it goes to the children of these brothers & sisters and to the Great Grandfather Lothian all being in the 3d degree and not by representation but as next of kin per capita the old stock being removed

12th it is the same only Lob.s is living & being in 2d degree takes the whole as all the relations are in the third & 4th

13th it is the same only Lob.s & Lothian are dead & A the child of Tho.s leaving in this case the estate is divided between B. C. D. E & F the children of Sarah. Tho.s & brothers & sisters — Geo. Edm.d & Alice per capita for they are next of kin & M the child of A cannot take being a brothers grand child which the right of representation does not goto in the collateral line

(d) If there are no descendants the Stat directs one half of the intestates estate to go to the wife the other half of the surplus after debts paid goes to the ascending & collateral relatives — if no wife or children the whole surplus would go to them —

(e) Estate is in both countries after payment of debts —

(f) In 3d P. Wms in note D. we find it laid down that where a person entitled to a distributory share under the Stat dies before distribution which cannot be made until a year has elapsed after the death of the intestate yet his share is a vested interest & transmissible to his Exr or administrator — so too when A the son died leaving B. the father who was entitled to his estate & B. died before distribution. A's estate did not go to his next of kin but to the next of kin of B. in whom the estate was vested before distribution. —

(g) In the Stat upon the 1st 2d & 3d it is determined that the mother of the intestate after the father shall have no estate but they are to take an equal share with her — but the 4th adverts to the case of the grandfather as being in the first degree for this Stat is said to speak only for the benefit of brothers & sisters and their children. but upon the principle adopted in 3 Atk 762 there is no oc-

14th The words case the terms only B. b. D. B. Pt. are dead the estate the estate goes to Geo. Edm.d & Alice for the children of A. B. b. D. B. F. are excluded for they are not next of kin. for they are of the fourth degree whilst Geo Edm.d & Alice are in the third and they cannot take by representation for that extends only to B.o Th.s & d.rs children whilst the children of A. B. b. & F. are br.s & s.rs gr.d children —

15th Terms only Geo. Edm.d & Alice are dead the children A. B.s who are brothers Gr.d children will take as next of kin for these are nominants the old stocks are all removed and the children of Geo. Edm.d & Alice will take with them for they are also in the 4th degree —

16th George & the children of Edm.d are alive for takes the whole for no representation can be extended beyond brothers & sisters children

17th Geo being dead his children with those of Edm.d take as next of kin per capita —

Under the statute of 22 & 23 Ch.s 2 The widow is intitled to 1/3 of the personal property if there are children or descendants (2) & in case there be no widow is intitled to her dower. the residue goes to be distributed (2)

Posthumous children take equally with the children born before the intestate death —

The Courts have inclined to brothers & sisters to the grandfather tho both are in the 3d degree this was decided by L.d Hardwicke who said it many decisions & said they were right probably meaning the law ought to be so —

Notwithstanding the stat of D.s the mother will not exclude the Grandfather —

These statutes distribute to the next of kin by consanguinity not affinity (h) & means legitimate children

(h) see next page for the note

casion for considering the mother in the first degree in this case as by that decision she would exclude the gr.d father although of the 2d degree — that decision of Ev. v Ewins means the symmetry of the law (see next page of notes)

(b) The persons who are entitled to the estate under this Stat. must be related by consanguinity, not affinity as by marriage. — Viz. A.S. dies leaving no lineal descendants (children & children &c) the wives & husbands of his sons & daughters cannot inherit. —

(c) A different mode has been adopted in some parts of our country and the superior Ct. of Con. have decided, that the grand children where there were no children living have taken what their fathers would have taken per stirpes. but there is not a scintilla of evidence to decision of any court, nor the dictum of any judge or lawyer to support that decision. The terms of our Stat. being the same as those in the Eng. ought to receive the same construction. this decision destroys the symetry of the law for there is no pretence but that which the same terms are used in the Stat. respecting collaterals the mode laid down in the text is the right one & the same words certainly ought to receive the same construction in both parts of the Stat. 2 Vt. 215. Gen. Ther the Legis. of N.Y. have omitted the words "right of representation" in this Stat & have detailed at length the distribution laid down in the text. —

Authorities in support of the above doctrine —

mode of computation of Kindred both in Chancery & Eccl. & civil courts both by civil Law 1 Vis 334. Chancellor says the rule of computing Kindred is by civil Law dispute was between grand daughter of a sister & the daughter of an uncle it was decided they should take equally 1 P Wms 41. 2 Vis 214 Prec Ch. 50. 2 BC. 515 to 520. 2 Vern 335. 1 P Wms 25. 595. 2 Atk 118. Co Lit Har. 3d Lov. Wilk 78

That the distribution is to be made in the ascending line sometimes per capita sometimes per stirpes. see Lovelys 74 Burns Eccl. Law 365. this is no where controuled

When children are all dead who left children they shall draw both by their own right & so if they only grand children — is to be divided equally per capita

Posthumous children take in the same with the other children 1 Vis 153. 2 Atk 115. 4 Burn Ec. Law 365. 1 Vis. 85. —

That when All are in same degree they take by capita. when some are in a remote degree the distribution is per stirpes — see —

2 Vis 215 when the parties is living & some neph- -ews they take per stirpes Prec. Ch. 54. 3 P Wms 50. 1 P Wms 595 1 Atk 455. (c)

That representation continues ad infinitum among firmals see 1 P. Wms 27. for descendants always excludes ascendants collaterals from the stock

That representation cannot extend beyond brothers & sisters children when any brother or sister is living see 1. P Wms 25 — representation does not reach 4th degree 2 Vern 233. 1 P Wms 25. 594

x) That a strict adherence has been observed by the Chancellors of distributing to the nephews of Kin according to the computation of Kindred by the civil law is evinced by the following authorities R. 6 527 When the grand mother who is in the second degree is preferred to the aunt who is in the third degree. the same point is adjudged in 1 Salk 252 & 1 P. Wms 41. where the great grand mother takes equally with the aunt they being both in the third degree. 2 Vis 215. I know of no departure from this principal except in the case alluded to in these notes of preferring brothers & sisters to the grand parents when they are both in the 2d degree which on all the symetry of the Law

Pre 61 a 28

That all in equal degree take equal shares where there was no right of representation 2 Vs 213. 1 Salk 254. Pre 61. 527. (a) gr[d] mother has taken in preference to the cousin — 1 Salk 252. 1 P.W[ms] 41. 2 Vs 215.

That Relation of half blood take equally with the whole 1 Vern 437. (Vern 403 is not law) 2 Vern 124 1 P.W[ms] 53

That distributary shares vest immediately in the persons who have right to it subj[t] 2 Salk. 118. 1 Salk 229 - 2 Vern 710.

That all in the same degree collateral kindred of same degree take equally see 1 P.W[ms] 53. 4 B. Ec. Law 349. Law Will 74. exception may be found 3 Salk 762.

In Eng[d] if the intestate dies without any relation the estate goes to the King. but as we have no such character in this country. it will go to the first person found entitled elsewhere by Stat. — If a executor took adm[n] he would be liable for debts to the am[t] of assets but would hold any residue —

Even wife does not take the estate of the wife who dies leaving husband. Stat of Distr. 1 & 2 Ann 8. The husband is entitled to the adm[n] or if he dies before adm[n] his Ex[r] or adm[r] has it and issued by Stat 22 Car 2 c 10 the estate must have gone to the wife not of him — but the Stat of 29 Car 2 giving the estate to the husband & that the Stat of 22 & 23 Car 2 should not intrude to a former period — Thus husband tho is not liable for his debts contracted before coverture in capacity of husband but as adm[r] he is to the am[t] of the assets. 2 Bl. Com 504 Co Car 106 1 P.W[ms] 381 3 Salk 526

In those States as Conl where there is no such State as that of 29 Chs. but such an one as that of the 22 & 23 Chs. 2. the estate of the wife must go to the next of kin to her—

This Statute declares that a child who has received a portion in lands, money or in pecuniary legacy equal to the distributive share of the child shall not receive any thing more at the intestates death excepting however the heir at law who does not notice—

Whatever is given as marriage portion to set up a child in business in annuity to commence after intestates death or the whole share of a Gentleman - an advancement into— but trifling sums travelling expences or liberal education are not— in Gen. Sharp these expences of a liberal education would be — especially if it had been charged 3. P.Wms 317. 2 P.Wms 141. Whatever is made any other way from a friend or relative or even from his mothers estate is no advancement 2 P.Wms 353. 2 P.Wms 116.—

at &c. The estate of s.d A descended to his children a. B & C. and a. d died before he was 21 and unmarried - his estate received from his father goes to B & C. - but if a. d arrived at 21 & unmarried his mother Lucy would then if alive have taken with B. & C.—

laws of descent in various States of the Union

State of N. Hampshire distributes real property in the same manner as personal estate descends in Eng^d under the 22 & 23 Car. 2^d — Real estate goes to the heir of the person last seised — & in this single case only differs from Statute Law viz. If any of intestate children dies in parents life & leaves issue surviving, the estate goes not to the mother & brothers & sisters, but only to the latter — but if the child dies after 21 & unmarried & intestate in the life of the mother she inherits equally with every brother & sister. (a)

Massachusetts — says when an intestate dies "seized or any ways entitled" — in descending line the same as Stat. of 23 Car. 2^d degrades the mother all alike — If there are no children it goes to the mother next of kin — if no mother to the next of kin in equal degree — here however it differs from the Stat. of 23 Car. 2^d the nephews & nieces shall exclude the uncles, uncle claiming through the same ancestor which creates in all kindred of equal degree. Thus a niece or nephew a brothers grandchild & the uncle, the uncle however is clearly entitled as he is next of kin.

New York — the Statute has provided for children & father & in the collateral as far as brothers, sisters & their children. — (1)

In the descending line it descends as real property under the Stat. of 23 Car. 2^d (purchased goods both descended of whole blood &c) Thus goes to the father but never to the mother then to the brothers & sisters, never to the mother unless the estate came to the intestate on the part of the mother

In Vermont a differ. is that mary have double portion to the daughters. Las in ct. D. if a child is dead unmarried & under age the mother has no share with the brothers &c. with the exception of half in fee, not as answer to this is after debts paid. and if the father marry the mother of the bastard & recognize the bastard the child is entitled to the privileges of a legitimate

If the estate came by descent, gift, grant &c from an ancestor the estate must go to the descendants of that ancestor — & to the line of the blood. — they must also be brother & sister — but if it be a husband estate the line must be only brother & sister — of blood remain of him

The N.Y. State declares there shall never be any taking by capita but by stirpes. in the collateral line —

Rhode Island — the State has respects all the intail of the ancestor as no respects of sex, — the mother is degraded — the difference is the same as N York in. if the estate came by gift. devise. or descent it shall descend to those of the blood from whom it came. the law the estate goes as in N.Y. it differs however from the law in N.Y. in this that here the heirs take sometimes by capita, in collateral line according to the State of 62°

This State provides that when the father is dead it shall go to mother & brothers & sisters - she is only degraded when her husband is dead but if he is alive she will take her share with him. —

N. Carolina — It is not here necessary that the intestate be actually seised — no provision for estate tail — nor for an estate pur autre vie, living left after dd nor of an estate for years for that is personal —

L.L. left children & B. & with other collateral ascending & descending relations that provided that the lineal takes in preference. with this difference that the wife taking 1/3 not as dower but in her simple

Three children & B. & C. are dead leaving child ren these children take what their parents would have taken per stirpes. as long as any descendants are to be found — as in st 6 L. Law in N. York

I. L left no issue but the father Reuben. brothers Wm. Lewis Sarah, John & Susanna — N the child of Wm O P. the children of Sally — for S his father brother Rebecca Brown his mother sister — if no child the Widow takes one half & the father the other half respectively by Stat —

Next case to same only father is dead — the half now goes to the mother. the Widow retaining one half

Next case widow is dead. father Reuben & Mother Mary are living now by Stat. 1791 the father would have taken the whole but by Stat 1797 the father divides with the brothers & sisters of the intestate in equal shares

In my opinion these words in that Act "for the protection of patents" gives no advantage to the whole Island - which the same Statute in another place recognises -

This stat gives to whole blood an advantage over the half blood & this particular that says brothers & sisters which will make no distinction

Suppose a devise had been made to the next of kin — whole blood there has no advantage made these words — civil law construction is adopted

same case only Reuben is dead then many take with the brothers & sisters

as the last case only Mary is dead — the widow is living — she takes a moiety in fee simple Thomas and Sarah the whole blood take the rest —

same as the same but Thos is dead leaving his child N. who takes what his father would have taken & Sarah takes the rest —

the same but Sarah is dead with issue two children the M takes a moiety — N takes half of the residue and O P the children of Sarah the other half, per stirpes

There is here no limitation of representation to brothers & sisters children

2 as the same only Sarah Ino & Susan are alive half blood is half as good as the whole after the widow has had her moiety. brothers & sisters of half blood shall take equally with the children of brothers & sisters of the whole blood. so that N takes one share. 3 & P one share and John & Sarah & Susan each one share

3 as the same only N. O. P. are dead. after the widow gets her moiety the other half goes to the half blood Samuel John & Susan

4th as the same only Sarah no & Susan are.

but the grandfather is living the Widow takes half the grandfather the other half.

5 as was the same, except that the mothers father Alfred & the widow & the fathers father. Solomon are living now one half goes to the widow in fee simple and the other half is divided between Solomon and Alfred — The Statute provides that if there are no mother father children brothers or sisters it shall go to the lineal ancestor or ancestors & the Statute gives no preference to the fathers father over the mothers father — there will be a dispute for surplus so there also would be referred. I should think that all who bear the character of ancestors will take equally —

only 2 The child of Sarah R.I. the children of John Rose J V & W the children of Susan X the Gnd of Thos Y & Z the grand children of Sarah, The widow now takes 2/3 of the est clear & the other 1/3 goes to the next of kin. — There may be a dispute. by the civil law we shall find the children of the brothers &c of the half blood is nearer, than grand children of the whole blood, and we have seen that by a former statute children of brothers of the whole blood are to take equally with the brothers & sisters of the half blood

But Geo & Alice are also living they will take an equal share with the children of the brothers & sisters of the half blood, in preference of the children of the whole blood who are not next of kin. —

Case is the same only 2 of S. T. V. W. are dead all having children & Geo & Alice are also living Geo & Alice include those children last mentioned

Geo is dead leaving children 1. 2 & Alice is dead leaving 3. will take equal shares with S T W per capita i.e. 1. 2 & 3 will —

Case same only fig 3 is dead leaving children 4 & 5. then the Gnd children of the brothers & sisters viz children of J R S. T V W will take with 1 & 2, & 4 & 5 will take nothing.

All grand children of brothers & sisters are dead leaving children, all descendants of Alice are dead, 1 & 2 who are living & also their gt grand children of the brothers & sisters. —

Brothers & sisters are all living the estate although descended from an ancestor it descends the same as purchased estate.—

If I died having A.B. & C was born posthumous nothing of this is in the statute it says if the intestate left one or more children — now said he leaves C. by Common law C was not in esse by the civil law he was in esse & that is the law used in distributions in Eng.d When real & personal property are distributed in the same manner. if C would take personal he ought to take real property. I think he ought to in hunt

When the Dec.d & more than one child is left the W.o shall take 1/3 of the estate & children 2/3. the statute does not say fee simple as in an other place it does when it gives the W.o half she must I think take in fee for the word is estate. means all the interest of the intestate

When the statute provides for most of him. the most of him shall not devest the more remote but where it provides for ancestors all shall take together who are ancestors

The words legal representatives in this Act says D. Rumsey are evidently misplaced for they under the provisions of the Act. negatory in some supposable cases. Instead of following the words "next of kin" they ought to have been placed immediately after the words brothers & sisters of the half blood

Connecticut — Distribution of personal & real property of every description goes by the Stat of Bl.s in the descending line —

All the property, both personal & real except that which comes by devise descent or deed of gift from some ancestor or kindred shall descend to the brothers & sisters of the whole blood, & their children, then to the parents — then to the half blood, then to the next of kin and their representatives, preferring the whole blood

That which came by descent goes otherwise — it must however have come from an ancestor to take it out of the first rule

To the Brothers & Sisters, Parents, then to Brothers & sisters of the half blood then to the next of kin and their legal representatives — no representation is allowed beyond brothers & sisters children Prot.s & Sarah of whole blood & Richard Stiles also of the whole blood, brothers & sisters of the intestate are dead leaving children A. B. C. D. E. & F. who are claimants of the estate of John Stiles who died intestate & without issue I apprehend that A. B. &c do not take as representatives to their parents, but as next of kin to the intestate & in the case put Mary & Reuben the father & mother of the intestate living alive. Reuben would take the whole of the personal estate, & the real estate would be distributed equally to the father & mother — If neither father nor mother was living in that case the estate would go to Sarah Stiles, John & Susan Rowe brothers & sister of the half blood in equal shares. If there were no parents or brothers & sisters of the whole or

In Kent. if the estate came by deed of gift from the father it must go to the father not as an ancestral but purchased estate.—

In those states where on failure of certain relations the estate is to go to the next of kin there is no provision made giving a preference to the next of kin of the whole blood except in Kent. where the next of kin of the whole blood exclude the next of kin of the half blood.—

half blood living then A. B. &c would take an equal share per capitas & if Geo: & Edmund Stiles made to the intestate were living they would take equal shares with them. The case would be the same if the great grand father Botham was living he would take also an equal share with them. But if Solomon Stiles the grandfather was living he would exclude A. B. & &c Geo. Edmund & Botham & take the whole estate real & personal. — These rules apply to estates held by the intestate ... or purchased estate —

If A held the estate by descent devise or deed of gift from some ancestor or kinsman it must go to the brothers & sisters of the intestate who are of the blood of the person from whom it came & their legal representatives & for want of such relations to the children — of the person from whom it came & their legal representatives & for want of such relations to the brothers & sisters of the person from whom it came. on failure of these it is to be distributed same manner as other estate is which is not acquired by descent devise or deed of gift from some ancestor or kinsman. — the words of the blood in the statute are not used in the feudal sense meaning lineally descended from but merely this related to by blood —

[illegible] an estate to goes to father.

If a minor dies who had received an estate from his father it goes to his brothers &c. related to his father

If A. had not been heir to G. S. from whom the estate came, the estate goes as a purchased estate goes.

Virginia — Whenever the kindred of the half blood are entitled to take with those of the whole, they take equal shares with them — It is however peculiar to Virginia that she gives the half blood just half as much as the whole

In no State except this can the issue of a marriage which is "null & void" (the words of the Statute) institute — probably says Judge Ruffin refusing to the children of those who are divorced by Eccl. law for consanguinity & this issue has been adjudged

In this State if intestate dies without issue the estate is divided one moiety to the paternal relations & the other to the maternals

Posthumous children of the intestate take their shares, but those of the intestate i.e. no other posthumous children — If the father & mother of a bastard marry it legitimates the bastard to all intents & purposes — & the father acknowledges the child —

North Carolina. An ancestral estate estate does not descend in this state as in many others to those who are nearly of the blood of the ancestor from whom it descended but must also be the next of kin, who is heir to the person from whom it came —

A purchased estate goes to father & mother jointly with the right of jus accrescendi — (i.e. when the intestate dies without issue,) that is for their lives.

If no stock of issue are all dead their representatives take per stirpes — The computation is taken from the Common Law the ascending line is excluded in N. Car.

* cotton under clothes take with an inch in stripes

Delaware. It is peculiar to this State that representation among collaterals is extended to the grand children of brothers & sisters.

Where there is no issue it is another peculiarity that the widow takes a moiety of the estate as her dower and the residue to brothers & of the blood of person from whom it came, supposing it ancestral. if none of that blood it goes to the other brothers. If purchased one moiety goes to the widow, the other to brothers & sisters of whole blood, then to half blood. " then to their legal representatives & ~~half blood~~ next of kin.

Pennsylvania. In moral of the State the whole is preferred to the half blood. but it is peculiar to this State to prefer the whole to the half blood when the law has required that the person to inherit be of the blood of the person from whom it came. —

On the death of an intestate without issue, the widow is entitled to one half of the real estate for her life & this is to be in lieu of dower. If no issue goes to father for life & to give not descend from mother whom it goes to her the for next in the brothers & sisters of the whole blood who are of the blood of the person from whom it came. if purchased it is enough to be of the whole blood & it will go to the descendants who are in existence as long as any can be found. and there is no other state in which it cannot go to half blood if of the blood of the person from whom it came. if none of whole blood it goes to half blood & their descendants ad infinitum

& then goes to the next of kin & their legal representatives."

New Jersey. It is peculiar to New Jersey to give a preference to lineal issue male & to the collateral males as far as the children of brothers & sisters of intestate — the male who preferred takes double to the female — this law is said to attend — this however I do not know certain about, the brothers & sisters exclude (big of the whole blood) father mother. after that the half bloods exclude all others. —

Maryland. It is peculiar to this state & virginia that no posthumous children except those of the intestate can take a share

If the reputed father of a bastard marries the mother & acknowledges the child, the child becomes legitimate to all intents & purposes. —

This State makes a difference between ancestral & purchased estate. suppose descended from father's line. goes to father. then to brothers & sisters & the father's blood & their issue ad infinitum. then to father's father. then to his children & their descendants. then to gr. grandfather. then to gr. uncles & aunts & their descendants. then to mother & her descendants. then to mother's father his descendants so on as in paternal line. if none then it goes to the wife in fee then to her relations as if she were seized.

If purchased it goes to brothers & sisters of the whole blood & their descendants. then to those of half blood & their descendants. then to father. then to mother. then to paternal grandfather & his descend

tion to maternal grand father this descendants to
n ad infinitum.

Ohio diffce is made in ancestral & purchased. the first
goes to brothers &c. related to the person from whom it came.
If none, nor their representatives, it goes to the giver. if dead
it goes to brothers sisters of the person from whom it came,
it then goes to brothers sisters of half blood of intestate
whether related or not. if none then it goes to next
of kin of intestate who are of the blood of him from
whom it came. The purchased estate goes in descg
line as in other states. Estate per capita! then to
brothers &c of whole blood & legal rep. if none to
those of half blood & legal rep. then goes to father
then to mother. then to next of kin.
At legitimate child born out of wedlock. if marriage rec-
eeds & the child is acknowledged.

Of Estates in Joint Tenancy, coparcenary & Common

The Eng law must vary in many respects from the law in the U.S.

I shall first treat of the Eng Law & then shew the distinction — they are often mistakenly confounded.

When an estate is holden by a single person, it is said to be holden in severalty, as entirely distinguished from tenancy in common & coparcenary

there are only three kinds of joint estates Tenancy in Common, joint tenancy, & coparcenary & all joint estates & no others.

Of Joint Tenancy — you cannot create any other estate by the act of the parties except joint tenancy, unless some particular words are used to shew it is not meant for joint tenancy.

By examining how a joint tenancy may be created & severed will give us the whole law respecting tenancy in common.

Joint tenancy can be created only by purchase. Where an estate conveyed to more than one it is a joint tenancy.

Of the properties of a joint tenancy

There must be a unity of Int. of Title of Time & of possession.

This means that both tenants must

have the same interest. They must hold by one and the same right of the joint, they titles must vest in each at the same time. and both must have possession.

Now when the estate is created both parties own alike - each one undivided half of the whole. — the conveyance to them must be by the same instrument —

If a lease is made, to them both to one of the joint tenants they both have an interest in it so the entry of one enures to both —

so that in all actions relating to the joint estate. they must sue & be sued jointly.

One joint tenant cannot sue an other for trespass. - if one kicks the other out. the one ejected can maintain an act: of ejectment as it is called to get himself into possession. -

By Stat Westr. 2 One joint tenant has an action of waste against his cotenant. and as it respects us this is C.L. because enacted before our ancestors came to this country —

By 4 Anne. the joint tenant has an action of account against his cotenant: but this is not of force in our country. this was a necessary stat. for the purpose might not have been guilty of trespass. & still have acct: more than his due share of rents & profits —

An the incidents of quit to consequence to an estate of joint tenancy was the jus accrescendi — the joint tenant could prevent this by conveying away his part & thus destroying the joint tenancy. but he could not devise it away —

No real property was devisable until the Stat of Wills 8. & that did not include joint tenancy — this is the true reason why it cannot be devised.

But if the estate was personal he could & can now devise away his share: which shows the construction of the above reasoning as personal property always was devisable —

An estate in Joint tenancy may be severed & destroyed in three ways. 1st It may be severed by partition by agreement. I suppose the Statute Wills might have been done without deed — by a practical division by staking.

But since that Stat: the mode is to make a practical division & then give quit claims —

Before the Stat. Lands were conveyed by deed. and of a partition by deed could have been made before that Stat I see not why it cannot since

2 By 6 & no one joint tenant could compel another to make partition — but by Stat of the 8

a joint tenant can compel a partition & this is now our C. L.

Of late years the practice has been to go into Eq. the it may be done at Law—

The course is now to go into Eq. states that he holds with another certain lands. & avers as a reason that his co-tenant will not agree to make partition — he then states that it is to the advantage of both parties. & if the jury find for a severance the Sheriff by the verdict of twelve men makes the partition which if sanctioned by the court is binding forever.

The third method is by one party selling or conveying away his interest in the estate —

any act by which you sever the joint tenancy destroys the jus accrescendi —

The doctrine of jus accrescendi does not hold as to the partnership of merchants in partnership although words of joint tenancy are used — Neither does it hold as to joint stock or a fund — as where one has a fund upon shares —

But every estate held by two is held in joint tenancy subject to this incident — the act of the one binds the other — a lease by one is sufficient and the one dies the estate goes entire to the other

P. This is an exception to the rule that there is no jus accrescendi in mercantile law— that this does not deprive the Ex[r]. of his other rights as Ex[r]. he may collect property that must account with the other partner so that the obligation to account is made a—

When a joint tenancy is severed — in some cases they hold as tenants in common — that is in all cases where the possession is not severed. In other cases in moveables. The law of the Eng. Law — Some alterations have been made in the U.S. —

By most all the States laws of the U.S. the whole of one's real estate is devisable —

In some States the jus accrescendi is destroyed — entirely — & when a man is empowered to devise it by name or in shorter the general terms of the Statute — then is no jus accrescendi if he devises — if he does not provide for it would remain —

State of N York says that the words which create a joint tenancy in Eng. shall create a tenancy in common. & thus the Eng. rule is thus directly reversed. —

Some States and Con. have by a long course of decisions treated estates held in joint tenancy the same as estates held in tenancy in common. —

In the time of the revolution there was no state that had not united to authority of all Eng. statutes after the emigration of our ancestors. —

The right of suing & the liability of being sued attaches to the surviving merchant and not to his deceased partners executors — whom recovery is had he must account with the Exrs. 91

For authority to these points see Bl. Com. Tit Tenancy & Co. Lit. 185. 2 Bl. 180 to 187. —

Coparcenary

This estate is always created by operation of law viz by descent. — Whenever one estate descends to two or more they hold in coparcenary — as where real estate descends to females Eng so in those places where the law of Coparcenary prevails — & throughout the U.S. where there is no right of primogeniture. or preference of males

Coparceners hold the same quantity of estate & the same title: but it is not necessary that there should be any unity of time: for the title of one may accrue after that of the other. —

Coparceners can maintain no action of waste to this day; because the tenant might by L.L. make a partition when he pleased — but in joint tenancy he could not. — there is no jus accrescendi in coparcenary. —

The entry of one coparcener is the entry of both sole — they have no action of trespass — but have by Statute an action of account — by Ct. Stat. before mentioned. —

You will observe that parceners are entitled properly each to the whole of a distinct moiety; whereas joint tenants have each an undivided moiety of the whole & not the whole of an undivided moiety. —

Tenancy in Common. has none of the unities requisite in joint tenancies & coparcenary except the unity of possession — one may hold by deed another by descent — one's interest may be for life another for years or in fee &c.

Whenever the title is joint tenancy is severed & the survivorship is not secured the tenants hold as tenants in Common —

A Tenancy in common may be created by words as adding to the usual terms of creating a joint tenancy. that, "the estate is not to be held in joint tenancy" — or "to be held as tenancy in common"

Tenants in Common are compellable to make partition by stat 8 Hen 6. There is no jus accrescendi — a tenant in common may sue for his own right by himself & this he must — this is by L. but not so in Tenancy or coparcenary —

Joint tenants or coparceners may sue alone & when he or coparcenor recovers possession it inures to the benefit of all his co tenants. — this appears to have originated in the inconvenience of compelling all to sue at once & was introduced in Law when I first commenced practice. — before they must all be joined. previous to our altering the law it had been altered in some of the neighbouring states —

There have been contra decisions as to the question whether where land was given to A & B "to be equally divided between them" they held as tenancy in common or a joint

Incidentally the decision should have been the same in both courts, and both went upon the same ground of giving effect to the intent of the donors. In such cases words are said to create a joint tenancy in lieu of a tenancy in common. 2 Bl. 193.

tenancy. In courts of law called it a joint tenancy & this a tenancy in common (a)

There is no statute of limitations that runs so as to bar any title when does not go into hostilities: for the possession of one is the possession of both. Tho if this one buys the other one out & would not let him in on demand but claims to hold by an adverse title a great length of time will destroy the ousted one's title. for the presumption is after a while that it was formerly settled between them. but no length of years prescribed by the Statute of limitations will affect this. It goes upon the ground of an actual ouster. If there is such an ouster & the party does not claim it is undisturbed by destroys the title. Bl. Com. 171. to 194. 1 Rep.

These cases of joint estates — if you can conceive of one in which there is a total destruction of the property as you easily can if it is personal — one action of trespass will lie in all kind of joint estates as when a tenant in common permits above a mill of which he owned half an action of trespass may lie against him — and the same in case of suppliers in joint tenancy and coparcenary.

No accessory in trespass there are several other things in which trespass will & does agree — they are several — There must be a mutual misfeasance, not merely a non feasance. There is an exception where an officer arrests but does not return the writ, but there is passing trespass for the officer cannot show his right to arrest.

The Real actions are actions, Trespass on the case, vi et armis. waste, quetment & ejectment —

The principal actions known are trespass & quetment. waste may be but it is very necessary to understand it —

Trespass on the case is a mere injury done without force — whereas trespass vi et armis is always attended with force actual or implied. —

The action of Trespass vi et armis is founded on possession — but when one's possession is disturbed this action is not always the remedy — sometimes a trespass on the case is the remedy — as when one conducted the water from his roof by his spout into his neighbours roof — he had a right to erect this spout & the trespass being consequential an Act. of trespass on the case is the correct remedy. These distinctions are all very nice & in my opinion useless. indeed an invasion of the subject's person or property might make it trespass vi et armis — Case is the remedy for nuisance.

Trespass vi et armis is an action writ & very man was obliged to pay 6/8 for it: but when the writ came to be issued he recovered the fine if he succeeded. After the purpose of avoiding this fine trespass on the case was introduced & the judges in this case used a misericordia instead of capiatur which it was in trespass vi et armis

(q) It is laid down in L^d Ray. 1402. 1399. That for an act immediately injurious, trespass is the proper remedy. Stra. 634. 2 T. Rep. 225. 3 Wils 409. 417. Bl. 894. 899. Burr. 1114. 1559. 2 Wils 313 L^d Ray. 188. 272.. Bl. 897. For an act consequentially injurious, case is the proper remedy— 1b anc. 1 Rep. 26—

r) It was now settled that under an action vi et armis you may recover by way of aggravation all the injury you may have sustained — as in case of seduction where the parent brings an action vi et armis the entering is the trespass as pulling the latch. but he recovers by way of aggravation the consequential damages.— But if the trespass had not been proved. or Def^t had justified by special plea. the Def^t would have been entitled to the verdict. Or parent may bring an action on the case merely for debauching his daughter. per quod servitium amisit. 2 T. Rep. 4. 168.

See Stra. 635. L^d Ray. 1402. where all the law on this subject is to be found. — (a)

A man be liable in an action on the case when he would not be in an action of trespass vi et armis or when one does a lawfull act for which you can bring no action unless the injury accrued when the injury arises thro non feasance merely —

L^d Ray 188. Fitz. 23.

This has been a question — A commits a trespass by letting down the fences of B. & B's cattle got in and do damage. some say that you must bring two actions & others that you may recover the damages you have sustained by introducing the the damages consequent of the trespass vi et armis by way of aggravation. — 5 Bac. 160. (a)

Whenever a man gives a license to another to go & do a thing and he abuses it and is of trespass vi et armis will not lie — but if the license is by law & is abused. the party is considered as a trespasser ab initio — of vi et armis — as if one enters a tavern — a a constable entry the house by criminal process — so if one officer destroys property taken in execution. 8 Co. 146 5 Bac. 161.

By Ld.

In order to maintain an action of trespass vi et armis

In cases of real property the special proprietor or bpee may maintain trespass ag^t gen^l proprietor unless bpee but he cannot in case of personal

Common law draws distinction in law & eq^y but in real it does not In Ag^t the Pff must have legal poss^n & remotely equitable If we are in poss^n in U S trespass lies by the owner

you must be in actual possession of it. if your own personal property that is sufficient possession — but if it be real property — as when land descends & trespass is committed upon the heir enters, he cannot maintain the action in Eng & if he died before entering it would not descend to his heir

But in U.S. or most of them. if a man has a legal seisin it is equally effectual as actual seisin in Eng — and upon any body land & moves on it & title be actually possessed until some one takes adversely against you so that with us. the two kinds of property: real & personal are both alike with regard to seisin. —

That a possession in fact is made out in Eng see 2 Chit 209 Latch. 263. — 3 Bl. 200

When one has actually got into possession in any manner he can maintain this action as a disseisor — & a disseisee can bring no action except to recover his possession. & even he recovers against the disseisor he can bring an action of trespass for the mesne profits supposing the disseisee to have been in possession —

I very much doubted whether this action for the mesne profits can according to principle be maintained. —

if you bring an action of any kind in which you can recover all your damages you shall recover

Defen can recover of Defendt no doubt. but he may be a bailee
Defendt can recover of the trespasser if trespasser has paid the
Defendt & Defendt cannot sue him. if not he can, he being
suppose continually in poss.

141 The defendt of real property is entitled to this action, as trespass against
the owner. But the bailee of personal property, has only
a right to sue in action on the case of the bailor.

"But if defendt should undertake to get his emblements. he is a tort-
feasor.

the whole. — And the law in most of the states allows it in this case. — But how the damages in the first trial can merely punitive & the real damages can be recovered in the second suit 2 Rolle. 553. that is the Eng. prac. and has been generally adopted in the U.S.

The disseisee when he has recovered possession he can recover of the disseisor all his damages against the disseisor — but a trespass has been committed while the disseisor was in possession for which he has received no damages shall the disseisee be bound to apply to the disseisor or may he pursue the trespasser also? — 11 Co. 51. Diff and cases 2 Rolle 553. 253. 551. Co Lit. 157. Dav Mort. 72.

There is another difference between real and personal property in this respect. If one holds a lease for years or to more & recovers the lessee can sue in an action of trespass viz et armis all that disturbs his rights. tenet if the tenancy be at will it is not so for tenant at will is not entitled to this action for he may determine the estate when he pleases Co. Lit. 4

It has been said that if land is taken upon shares the trespass is committed on the lessor must sue: but I think not & the reason may be urged the lessee is considered as bailiff & receiver. Cro Eliz 143. 2 Rolle. 568. I consider him as a tenant for years — that he has no right to this action for the damages to lessor.

As long as the highway is open by authority I take it that the adjoining proprietor owns to the centre of the

highway but not so as to disturb the easement. but if the highway is taken up by authority the land is to be sold to purchase new highways —

I observed that one to maintain post a action of trespass must be in possession. but it is necessary only to have been in possession when the trespass was committed. With respect to what is & what is not trespass? — see 5 Bac 173. 2 Roll 567

If what in the view of common sense is a reasonable excuse or an act of charity doing good to your neighbour avoiding an evil. yourself an action will not lie.

Another ground is its being done for public good as erecting a bathing against an known quay or towing a vessel in a river by walking on the bank — L^d Ray. 725. 5 Bac. 175.

So too for the destruction of noxious animals if started on ones own land he may by fresh pursuit destroy him on the land of another without committing trespass — But he cannot break soil to dig him out when holed Bulst. 62. Cro Jo 321. 5 Bac 175.

When one parts with property to a other there is an implied agreement for the seller to have on the land of the seller to get at it. when there was no other way to get at it or even if it would it would be extremely inconvenient for him to go around. but it must be with the least injury possible

So if tree or

the buyer has liberty to get them off —

But if a creditor levies an Ext. on a lot in the middle of ours farm he has no right to go across to it. 2 Roll 567. for him is not implied a permit. —

If a man should drive cattle from his own onto his neighbours land it would be trespass if he meant to drive them there. but if they run there when he put his dog or thing he is not liable. —

He may distrain or impound one for damage — but he cannot turn them into the street where they may be lost. unless they came in that way.

If a man is impounded he cannot sue for damage & if he sues for damage he cannot impound & when impounded if they do not agree as to the damages he may take out the cattle & give bond to pay all damages. by a writ of replevin which is issued out of the Ct to deliver the cattle to the owner & then the Pltff recovers the damages — but he cannot have two remedies at once — but if one of the remedies fail he may resort to the other unless the question has been tried upon it. 12 Mod. 663. 1 Salk 248 2 Ray. 720.

Imprisonment is only a temporary satisfaction by the statute. & if a prisoner escapes his property may be taken. — The rule is you can pursue but one remedy at once for the same debt. —

Suppose one sells a piece of land

* But not to write homes at some distance — I.S.D. 186

when he had the right of an easement the assignee has all the rights the assignor had. & he may dig in the soil to repair the pipe. — 2 Roll 566. 5 Bac. 174. for this is incident to the right of having such pipe. — So if one a man in pursuit of an noxious animal destroys grain he is liable. &c Fr. 311. 11 Mod. 75.

As a man has no right to make use of certain kind of dogs he is liable for all the damages that might arise from injuring the cattle or driving them on to a neighbours lands

Houses. — No man has a right enter another house without license. But in any case in which it was formerly called a trespass are now not so considered. — for if one has a charitable virtuous object in view it is no trespass: & if the entry is without ill object indeed without any discoverable motive it would be trespass, but damages would be so small as to afford no temptation to prosecute.

There are a sets of cases in which an officer cannot break open doors the owner in, he may break open doors in criminal cases however he may. I am now however speaking of civil process.

The reason is that the house and the quiet & comfort of the family in cities it would expose the house & its inhabitants to villians & robbers. — & this protection extends to buildings adjoining & communicating with the dwelling. 5 Bac. 177. And therefore it is if a man leaves his

and a man is not protected except in the bosom of his family so if he leaves his family in one house & shuts himself up in another it is no security to him.

The Eng. principle that a trespass mesne in a felony will not hold in this country.-

dwelling house & shuts himself, or his goods, in another building of his own which was not so near as to have to disturb the family's rights to him, but is not protected — & even when it is near, if the officer goes into the dwelling house & explains his intention the outer door is no protection as decided in Com. & Hall's:

In criminal process an officer may break thro' an outer door — so to arrest a stranger —

And. when a man is once taken & has escaped officer may break outer doors to find him for the officer would have lawful Bail. Palm. 54. 5 Bac 178

Agst. a man has no right to execute his neighbour or his neighbours goods the quiet & peace of the executor's family are not regarded. — and the officer may break in if not admitted on demand. 5 Bac 177

But I find this has arisen in a question of this kind. An officer breaks the outer door & makes a levy will the levy be good? It is said on one hand he is bound to levy when he finds his object — on the other that it is encouraging breach of peace of Common Law.

In 5 Co. 91 Semaines case it was held even that the levy was good — But the law now is different — For in a case at Bombay there was a great argument when an officer door was thus broken & levy made whether the door was an outer one or not so that it must be that it was understood that the levy would not have been good if it was an outer door.

(a) . And it is a dangerous doctrine that any one may break the law who is willing to pay the damage. The sound maxim of policy is this says L^d Mansfield. "That a greater evil should be "avoided for the less: & a less good should give way to a greater." The outer door thereof or window of a mans house, says the law, shall not be broken open by process: But as this is a maxim of law in respect of political justices, and makes no part of the privileges of the subject himself, it is to be taken strictly, & not to be extended by any equitable or analogous interpretation. Comyns. 6

* A principle of equity as well as policy ruled in the former case 6. discussed & therefore being a despiser is entitled to no indulgence but in this case he came in lawfully having hired the land for the purpose of cultivation.

I take it to be a sound maxim that no one can avail himself of a breach of the salutary regulations of the law (a)

Thus if a debtor only appears on the nebbath day he is falsely arrested & then an arrest is issued on mesne process; this in my opinion would be a void arrest. 1 Sid. 186. Cro J. 556. Palmer 54.

A man has a right to pull down houses to prevent the spread of fire 5 Bac. 186. 179

Whatever is actually a nuisance in the high way may be pulled down by any body — but it only that which becomes a nuisance that may be thus removed 2 Roll. 552. Dyer 285 5 Bac. 179.

With respect to disseisor & disseisee I will give you a case, as to their rights & liabilities A disseises B. and B dies seised of. B while B is in possession gets possession - now we are told that B can bring one action against C. this possession is blotted out of existence, & B is considered as having been all the while in possession — 2 Roll 554. Cro Eliz. 540.

A disseises B & leases to C. can B when he gets possession recover of C the rents that are due. there are different opinions — the distinction of the case and the former is — If C has once paid the rent to the disseisor he ought not to be obliged to pay it again for it would be a discouragement to agriculture

But the lessee has not paid to the disseisor but is bound by a covenant to pay it. — is he bound by that covenant? now I say that if he is, the lessee is not bound to pay it to the disseisee — but if he is not the real owner can sue him. —

But it is said that the consideration of that bond or covenant cannot be called into question and it entirely comes to this if a sum in gross was given in bond. —

And in this case he must pay only to the disseisor — But if the rent is annually reserved & it is found out that the lessor had no title the rent ceases and he would be bound to pay it to the owner — that is all he had not already paid to the lessor. 2 Roll. 552. Cro. Eliz 540. Jenk. Cent. 81

A lessor can maintain no action of trespass unless he has reserved certain trees — they being for timber. — & the action may state trespass viz at large for going on his land & cutting the trees. — L^d Ray 739 5 Bac. 160.

But we are told that an act. does lie against a tenant at will for trespass by the lessor for any act that was his estate to the 57. Cro. Eliz. 784. 5 Co. 13.

A man takes cattle to pasture and the cattle do damage by getting into the neighbours land — who is liable? I know of no principle that would subject the owner except, as connected with his own act as, keeping mischievous cattle but when the grazier is guilty of no fault the owner is not

Liable 2 Rolle 546. 5 Bac 188.

The statutes of limitations as to acts of trespass vary from one to three years in the various states — that is the acts must be brot within that time — but in general it is 2 yrs before the right of entry is taken away.

In an act on contract the statute runs only from the time of performance not from the time the contract was made — But in trespass — the wrongdoer does not know who committed it — the statute prescribes two years for this action to be brot just after the two years one injured he discovers the trespasser — there is no case in the books which would warrant an action — I also not know however but it might be supported: the reason against it would be such as, that it would be very difficult to tell the exact time when the trespass was discovered — or generally that the action was finally brot to indulge his revenge. I that there are no decisions of courts to support it —

The laws in the different states make trespass very penal — he one goes and by mistake cuts timber that does not belong to him and he is prosecuted on a statute that gives seven for actual. it appears on the trial that he is not liable on the statute — still the declaration is sufficient on which to recover the 6 & 1 double damages — similar to amount of injury sustained — altho there is a demand of more than can be recovered: as the treble damages, and this principle runs thro all cases similar — They I know of a case where a man was prosecuted on the statute for selling a disputed title — he being indicted

to recover the premises. This indictment was not brot. until the statute of limitations had run against it. it was determined that altho no recovery could be had of the premises, still the 6 £. fine might be.—

As to the statute of limitations

I would further observe that where one is dispirited he must gain possession in 20 yrs. in Eng. & some of the states; in others 15. This length of time has been considered as giving complete title, but by C. L. 60 yrs is required to give title by prescription—

In those states where they treat real & personal property alike as to prescription: that is where ownership is considered as prescription, it gives title & the man in possession is apparent. Where one has a right to the prescription he has a title: & in those states ownership & the right of prescription is the same thing: at C. L. it is not so.— But now take away the right of prescription & you destroy the ownership.—

What is the nature

of that taking away prescription which destroys the right of entry?— It is not a trespassing prescription — but if the dispirited treats the property as his own for the given number of years.— Fencing is a good act of ownership & so combinedly acting as if it was his as cutting of timber wood &c.—

P. sells to T. N. 60 acres & in this land is included a grant not fenced — but T. N. claims the whole and uses it as such for 20 years — this will destroy the right of entry of every one.—

(a) and if it be not pleaded in abatement the advantage is waived and the defect is cured by verdict. — tho the jury find the damages in excess of the ad damnum Cro. Eliz. 554.

Those creatures who are from nature belonging to the man upon whose they are found as long as they are unable to get off — this is of little consequence, except in relation to bees which are governed by the customs of the various portions of the country.

Suppose A sues B for trespass & he with others the said A & B are tenants in common of the land he must plead this in abatement — 1 Ves. Eliz. 143. 5 Co. 4. Salk. 4.

The law is this if you are sued by one tenant in common for trespass on the common land you must plead the non joinder in abatement. 2d

But you may sue one or all or any number of trespassers — for it does no harm to any one nor any injustice. But in contracts the Defts must be joined if joint: if joint & several & one is sued he has a writ of contribution against the others — but one tort feasor has no writ against the others. —

You will will find a rule that if a verdict against three Defts as to recover different sums of damages the Deft may set aside this verdict if he please. — It is clear that he entitled to the whole amount of proof on all & the principle of law is that he may recover the whole damages from each one of them. — I suppose proof of Defts are before me — he then hears proof of what the jury have said he ought to have. only he can set aside the verdict. —

There is an inaccuracy in the books as to the justification of trespass. Suppose one is sued for not pulling off his hat off to his neighbour — & he pleads not guilty does he mean he pulled it off. or that if he did not it was no trespass — Not guilty as we use it means that I am not guilty of the facts. whereas it ought to mean that I have done nothing for which I am liable to damages. This has led to the practice of pleading justification specially & thus spreading it on the record.

Every thing which amounts to a denial of the right of action may be given in evidence under the general issue in this action. 5 Bac. 214. 1 Int. 283. Stra. 61. Salk. 4.

But matter of justification as cause or discharge as it admits the facts must be pleaded specially in bar. 5 Bac. 215. 1 Lord. 283. Salk 287. 12 Mod. 412.

Of the action of Waste.

I shall point out to you under what circumstances this may be brought & then what is meant by waste. This is an action given to the owner of the inheritance when he has parted with the possession for years or estate for life by the possessor —

Waste is of two kinds voluntary as when the tenant does it himself. and permissive where he permitted some one else to do it — and the tenant at W. L. is liable for both kinds — He too may recover of the injurer but the injurer cannot —

Originally

this action lay against such tenants only who are in by operation of law. as dower or curtesy ~~or~~ guardian in chivalry and this to prove was that all owners would take care of the property in the lease by inspecting the tenants.

But by a very antient statute it lies against all tenants for life or for years 5 Com. Dig. 671. Co. Lit. 54. 5 Co. 13. The statute was the Stat. of Gloucest. 6. Ed. 1st. 2 Roll. 826 & by the Stat. the property waste was for future and tenants at will as well.

This liability goes with the person who is entitled to the reversion that is with the land or if the land be assigned.

And the right of action goes with the title or ownership of the land Co. Lit. 54. Com. Dig 683.

So where the lease goes into the hands of one executors it is attributed to the children the one in reversion is liable. 3 Mod. 93 5 Com. 675.

It is the reversion not a creation of that makes the liability for it upon which his lease lies not liable for subsequent waste 2 Roll. 829. 821.

Suppose the fee should be assigned the lessor has no action, the action of permanent belongs only to the lessee.

Where waste is committed by one joint tenant the action is to be brought

1a) The question is personal action mentioned personal — Suppose P. Sim that case received a reward for shooting the horse? This would make no odds for it is an extraneous matter the harmful resulting from the shooting.

against both tho the penalty is recovered against the waster only — 5 Com. 676 2 Inst. 302.

It was said that if a person not committed waste cuts down timber he is charged. that is doubtfull whether the heir bound is liable — there is no room for doubt he took them for better or worse. 2 Roll. 827.

Now you will find that that action is to be brot ag.st tenant in fee simple tenant only & not ag.st his Ex.rs for it is a tort and injury done. And all torts or actions that dies in the good will not survive an action. after the tort feasors death. —

If A maliciously shoots a horse. the right of action dies with A. (d) but if he had taken off the horse his Ex.rs would be liable for it.

Of waste

It is if it could be proved that tenant received benefit from the waste an action does lie ag.st the Ex.rs tho not an act.s of waste. but on the case strictly vested to the Exs. 5 Com. 676. Hambly & Trott in Camp. c. 371 —

If a husband man. is a common that holds a lease and then commits waste, he cannot be sued after his death for that waste. — this is the rule as it is laid down but I see no reason for it — 5 Com. 676

It is now a common thing to take leases without impeachment of waste 5 Com 676. Moore 327. This is laid as a ground for Ld C to assume jurisdiction in cases of waste. For Ld will not understand this to mean that the tenant may destroy every

Mortagee can bring no action of waste because he can at any time get the gor besides the mortgagors interest is often worth the greatest — Neither can bring an action of waste against mortgagee in possession for the latter may use any means of getting his debt.

every thing before him. and in this case Ch. will give remedy where the courts of law will give none. —

Mortgagor is never liable for waste, nor is the mortgagee if he is in possession but Ch. will always grant injunction to stay waste in any circumstances may require —

And at common law all waste by mortgagor not to be recovered for — by Ch.

In ancient time, if the damages did not amount to 40s. the action did not lie — so if the damage was done by the acts of god. 10 Co. 139 Co. Litt. 53

This is a general maxim that yields to nothing: the person can bring this action of waste except the immediate remainder man in fee or in tail. — Thus A. tells his estate for life to A. remainder to B for life. remainder to C in fee — A commits waste. B. cannot bring the action for his estate is not of inheritance C cannot for he is not the immediate remainder man. But if C dies prior to the immediate remainder when action brot. he may maintain it 6 Co. 76. Co. Litt. 54. 2 Roll 829. Moor. 18. Cro. El. 688. Moor 307. as by the death of B. C has an estate if B estate is only for years.

The person that brings this action must have the inheritance at the time of committing the waste. this is now fundamental rule. Thus the heir cannot bring an action for waste committed in the life time of the ancestor. 5 Com. 674.

Waste is committed — houses Lands generally & specially in
gardens & timber —

As to the houses the rules are very singular
& I think would not now be acknowledged — The
tenant is to keep the house in repair — but it does not
mean that he is to repair the ravages of time —
But all injuries are ipso to be prevented, or reed damaged
so that a view may the timber be is liable —

In Eng it has
been said that if tenant pulls down an old house and builds
a better one it is waste but I suspect it would not be de-
termined so now — Reason was — that Lands were con-
veyed away without deed & witnesses were the only
evidence of transfer, and a change of the appearance
of the Land would puzzle their memory thus
if plough Land made meadow it was waste
2 Roll. Ab 815. Co. Litt 53. Hob 234. 231. —

Case of this kind
The tenant found that a certain kind of mill would be of
double the value to him & the owner — so it was of a
new house — but it changed the face of the property &
was waste 2 Roll 815 1 Lev 309. 1 Mod. 94.

In other respects than changes of the face of the property, there is
nothing particular to be noticed — except Lands digging ditches whereby
which Rainfall water
as to walls that Rainfall water &c it is waste to suffer the

to decay for it injures the inheritance. 2 Rolle 816: Moor 69

The tenant for life or years has no right to open mines unless he is entitled to by the lease but if there are mines open he may use them. but cannot open new ones Co Lit. 53. Moor 101. 2 Roll. 816.

To change from arable to meadow & vice versa is waste unless it is sometimes used promiscuously 2 Roll. 815.

There is a remarkable case in 2 Leon. where wood land was changed into a hop garden which was waste. altho they rendered much more valuable.

Now in this country in such cases there is no such regard in improving the property. I state the rule as it is found in the books 5 Co. 12. still I doubt whether it would now be recognized in Eng.

It is not waste to use the land cleverly as with lead or manure. 2 Roll 814

Timber The tenant has no right to cut wood except for fuel & instruments of husbandry unless he has right by the lease expressly

And as they are bound to repair houses & fences they have the right to use the timber for that purpose without any provision in the lease — & it would be waste to cut green trees when there were dry for that or timber trees Co Lit 53. Moore 812. What are timber trees is to be determined by the usage of the country.

All other trees except timber & ornament or fruit may be cut for the above purposes — But the right is strictly bounded thus —

A Tenant cd some trees to lop timber to repair with
although the timber purchased was better than that sold it was waste. —

If the waste is owing to
his own misconduct the tenant cannot cut timber to re-
pair with. 2 Roll 822. he must repair from his own proper. —

Dead timber trees may be cut for
fire wood 2 Roll 814 so may decayed ones —

A lease to B & excepts the woods
& B cuts them it is not waste for A is estate in pos-
session of the woods & B is a trespasser not a waste. —
tor. — for when any thing is excepted it remains as before
the lease & cannot go by the grant & not to the grantee 6 Co 8 Cy
690.

I observed that the things wasted & treble damages
were forfeited for waste — this would be difficult to ex-
ecute. — When tenant cuts timber on parts of his
leasehold he forfeits only that part. 5 Co 6 82. Co
Litt 53. but if in part he forfeits the whole —

The tenant is excused when the waste is com-
mitted by the act of God tenant is not liable. but
if by a stranger he is. —

When by accidents or a thun-
der blown down he is bound to repair. but if destroyed by
lightning he is not. —
Co Litt will give an injunction to stay waste always
when a recovery could be had at Law — but they
also exercise powers in those cases when the court

of leave will not. — Thus a lease is granted without
any impeachment of waste. Ch J giving a different con-
struction to those words, & will not suffer wanton
waste. — saying that a court of Law ought to give
relief in such cases — interfering to prevent malicious
waste — Rep. Dom. Rel. 457. 2 Show. 169 &c —

So Ch J have interfered in cases more questionable
as where there was only lease for 16 yrs without impeachment. & the
tenant lived 15 yrs without committing any waste &
then chaned up a tale to sell the timber when all the 16 yrs
a grand lease might have run out to ch J grants an injunction
year by year. 2 Br
Ch J. 89. 1 Ves J. 521. 3 Br. Ch a. 549. 565. 2 Ves. 338
1 P. Wms 528. 1 Vern 255. 3 Atk. 217.

So Ct of Law refuses to
grant an injunction of waste against the man who
held the legal title but Ch J grants it. Rep. Dom. Rel. 450

An Estate is given
to A for life remainder to B for life remainder to C in
fee. — A commits waste neither B or C have the action
for the reason above given at Law — but Ch J interfere
& grants an injunction. in favour of C. —

Lawhere
there is a contingent remainder no action lies for the remainder
man at Law. but Ch J will grant an injunction on appli
cation by the remainder man or his prochein ami. No action
lies against him who has the legal title as a trustee for both
parties. but Ch J will enjoin such trustee not to commit
Waste — Fo Pacy. 83. 3 Atk 94. 702. 3 P. W. 150. Dom. Rel. 450

This action founded upon the ground anciently appropriate to that of Trespass — & is brot. to recover possession of one land & damages wherein in trespass the Plff must always be in possession. and brings his action to recover damages only. If one is sued in trespass & pleads title & it is found against him it would seem as if he ought to be concluded But in Eng. title is not tried by trespass But to try the question Plff suppose himself ousted & the Defr. cannot say that the never was in possession. as he cannot deny that Plff was ousted. Originally ejectment was used to recover only terms for years. but now is the only action to try real title. — This action was brot. to recover possession of the term together with the damages if recovery was had & it was found it would turn out any one that happened to be in possession. — but if the stranger is turned out it does not hurt his title & he may afterwards get the recovery if he can show a better title —

The land sued for must be described with sufficient certainty to direct the officer what land to deliver into Plff's possession when he recovers

When one has a contract & executions is issued upon Defr. land it gives title only & you bring ejectment to get possession: for it may be that the precept was faulty or the levy of it. —

After the alteration this act was adopted to get rid of the [illegible]

In Cont: the action is but directly against the adverse claimant the Pltff states that at such time he was lawfully seized. and that at such time Defts ousted him and he now comes to demand possession. The practice allows him to bring his action and declare himself ousted, for the purpose of trying the title which he is in. By this process every thing comes in question that it is necessary to examine. Pltff must then make out a good title for he cannot recover from the weakness of his adversarys title. - When he has recovered the Exn puts him in possession. He then brings an act: trespass vi et armis which in this case is considered in the nature of an action of act: for the mesne profits. - and then he recovers after the deduction of reasonable charges. Under the supposition that he has been all the while in possession. — This second appears to be contrary to our established maxim of law before stated & if it had been offered at first would never have any kind ground. In those places where the process in ejectment is by fiction the notion of trespass is usually brot in the name of the real owner - the Lr not why it might not be in the name of the fictitious lessee.

by now & express in &c. — The action however being only in case of Landlord for years: a fiction is used to apply it to fees. Thus D is in possession of Land that A claims. A & B enter upon the Land and A gives B a lease & B as casual ejector enters upon & ejects B. B then brings a writ of ejectment ag^t C. Now C writes to D to defend the title for he (C) has no right & cannot defend & apply to the court for liberty to defend & the Court will admit him provided he enters & admits the lease to B and his subsequent entry. — This he allows & then the title is tried — Now this is all fiction and in this mode all these trials of titles are had. It seems the strangest thing in the world that they could not go at it at once. — But since to avoid the trouble and formality of an actual lease entry & ouster. the action is founded entirely on a string of legal fictions which defft is not allowed to traverse — that is the entry lease and ouster. the real defft name is inserted in the record & goes down for trial on the strength of title only — Pl^ff when he recovers gets only nominal damages but is first in possession & then he brings an action of trespass vi et armis for the mesne profits on the supposition that he has been all the while in possession. — P. L. has been ejected 10 y^rs he makes a fictitious lease for one year & recovers nominal damages for one y^r he then brings trespass & recovers the whole mesne profits after the deduction of reasonable expences incurred in the cultivation. the recovery you will observe is not as ag^t a wrong doer. This is the process of ejectment in Eng^d & in most of the States.

The action of debt in one of these cases is made use of to save by a real injury —

Rent you will remember is an annual term reserved: it is not personal, but real property and goes to the heir where the land would go and not to the Ex^r — for by reserving the rent he does not mean to part with it — Rent is an incorporeal hereditament — this however is not of so much consequence here as in Eng. where all the real property goes to the heir —

In U.S. the rent is distributed as other property to the children: it is altogether real property — it is governed by the same rules in descents as real property —

If this rent is refused an action of debt is given for it by our old Statute, which is 6 E. 6 c. —

If it is rent service it is otherwise — for that is personal property & goes to the Ex^r — But the accruing rent that might to come, is to be owed for by the one who holds the land — that is the one to whom the land would have gone —

In this case of rent if it should turn out that the lessor had no title then can be no recovery — Def^t. pleads that lessor had nothing in the premises — or specially that some one else was entitled him. 6 comyn 588. 2 Ld Raym 1242. Mod 326 & therefore not bound to pay rent.

I observed when on point it was that the law allowed tenants in Common Joint tenants, an action for partition — Three things must appear in the Ct viz. the title of Plff & Defr & also that Plff has requested Defr to make partition & he would not —

& lastly if you find these two facts judgt is rendered that partition be made —

The 6l is not very often pursued, it is this — The Plff is arrived & proved by the oath of twelve men equally as to quantity & quality and a question may be made this whether the partition was fair & if the 6 men does not like the return, they make a new order — In Engl Plff & Defr there men & there is no room for litigation for it is decided when returned to 6th. office according to law —

In Scotland the return is made to the 6th. officer & the title is established — All the difference between our different customs, as to the title is established without appeal by the Court — Unless the process was in some manner illegal or some corruption in the proceedings —

Of Trustees — I have some observations to make. If A is trustee for B. A brings a suit in his own name — Once it was that the cestuique trust could not bring a suit in any case — but it is altered

to be very convenient to allow of it in person at[illegible] it was finally established — It was a matter of necessity since that has been determined that a personal action of ap[illegible] may be prot[illegible] by the cestuy que trust — Thus a will was made trusting to the integrity of an Ex[illegible] that he would provide for a favourite child — This child was allowed to bring the suit on ap[illegible] & bond by which the Ex[illegible] engaged to the Testator to convey to the child —

But still there is no instance in real property of an ac[illegible] being brot[illegible] by cestuy que trust if the trustee will not sue he can be forced to by bill —

There are cases in which the Trustee will never be compelled to convey to the cestuy que trust there are others where he will be —

If property is conveyed to Trustees for the benefit of infant children or the unborn, when these children are grown up they can force a conveyance to themselves — But when it is thus conveyed by the grandfather to keep it out of the way of a bankrupt & improvident son that his grand children can have it — the bankrupt cannot force a conveyance to himself

Trustee cannot affect the title of cestuy que trust except in one way viz. If trustee sells the land to a purchaser who did not know of the trust the purchaser will hold it. If purchaser did know it is fraud in him —

This starts a question of conveyance among us. Ordinarily the trust appears on the face of the deed & by looking at the record as title may be known certainly — And I do not see how there can be a sale or a subsequent mortgage without notice in those states where recording is ordered by statute. — It is a question which I have been decided not in cases of common sale & similar.

Implied — or — Constructive trusts —

P. S. wishes to buy a certain farm in Va. & gives N Notes the money. who is to go & take deed in his name. — & is then to convey the land to P. S. Now if N Notes will not deed to P. S. when he returns — he may be compelled to for it is fraud & parol testimony will be admitted. further the Statute of Frauds refers only to real conveyances & not to bargains — N Notes here is only a channel of conveyance — a constructive trustee. —

Or P. S. deeds to N Notes for the purpose of letting his wife get the title if N Notes declines he may be forced to convey it to Mrs P's. It is a case of implied trusts. N Notes is a mere conduit pipe. —

"Thus where a judg^t is recovered against joint trespassers and one of them pays off the execution. if another is prepared with it he may have the writ of audita querela

Audita querela

This is a writ given to a person when he has no opportunity to go into court — being hurried with an execution. when he has a good defence & no opportunity to avail himself of it — eg where an execution has been paid but not endorsed or the Defr dies his Exr — this writ stops all proceedings & gives a remedy — to Plff a power to settle & to discontinue his suit — & does not —

It is given in all cases in which nonetheless there shd be a judgt that ought to stay the execution — The Party goes before the Justices & states the case the Justices do not try the case — but he, after getting an affidavit of the facts, (stating an report to application of applicant) takes a bond, (with sureties) large enough to secure every thing — And every thing is then out in statu quo the prisoner is released his goods are discharged — it comes on for trial & if he who brings the audita querela recovers he gets all his damages he has suffered & the bond is discharged & it answers all the purposes of an action on the case. 6 Co 6b. 2 Ld R 3. 1 Co Ent 2 J. 1 Rolle 396 1 Sd. 23. W Jones 378. This writ is usually granted by the court who issues the higher writs of scire facias &c In B R it is granted by the Chief Justice of the County court. How this practice attained I know not —

The bond you will observe in this case cannot be changed at the sec Judge — And if the applicant does not prevail the whole bond is forfeited, so it is a dangerous thing to him; tho in no wise so to the adverse party —

Highways

By the British constitution the thing never disputed a man's land was liable to be taken & converted into high ways it is one of those three cases in which our property may be taken for public benefit. another is the taking of land for forts the other is in case of bridges. — This does not mean to take property without paying for it — but he has no bargain or contract as to it. Persons were appointed to lay out the road & assess the damages — This same doctrine has been adopted by us. But the manner of doing it is different in different states by statute. The right however is the same to the public however the road is acquired. whether it has given or sold or however the road is made and the rights remaining to the proprietor are the same
1 Mod. 231. 2 Mod. 243. 2 Ray. 884. Co Lit. 56.

The county is divided into certain districts. which are bound to provide & repair highways. whenever any person whatever thinks a highway is wanted he makes application to the Ct of Q. sessions. or it may be made by any number of men. the Ct then thinks to enquire whether it is a matter of public utility to have one at road. some states make this enquiry by jury called by bailiffs. A committee is appointed if the Ct think best to lay out the road & assess the damages — from this decision there is usually an appeal. if any one is aggrieved. in any manner

1 Hawk 212

It often happens that the old road is not wanted: the court has power to shut up the old one & the expense falls upon the district whose duty it is to furnish roads. — There is an officer called a commissioner in the various districts to repair roads & his accts are paid by the district. — The road once laid out every body has a right of passage & it cannot be obstructed by any one & if it is, it is a nuisance & indictable & any one specially injured can bring a private action & only those specially injured. — But there may be a nuisance that does not obstruct the carriage & yet injures & means accommodations as throwing wood down before one's door. & it is actionable — The rights of a public road is the same as of a public river.

The modes of acquiring highways have been different. e.g. to part of our highways were created in this way by selling to two men up to certain bounds leaving a road — in this way the proprietors relinquish the highway & all rights to them. The common way however is to lay out the highway as before described & paid for. — It has been contended by some that it belongs in fee to the adjoining proprietors each to the centre subject to the easement. they can certainly have distinct rights from that other people have

Boat of the C[o]. shuts up the road they have nothing to it. If they are bound by highway stile it is said they own to fix: this was given in this that the land is said is found for warrant & the owners paid for damages and when the warrant ceases the right reverts in full. But suppose a road is laid out as close up to the land of B. but took none of B. land when the road was discontinued it would belong to A exclusively according to this principal. The case where land is laid out so as to have ownership over the road as to whose it laid go to fast is the amount of rates go to the fund for erecting new highways —

The case is the adjoining proprietors / because they are such & not that they own the land / have rights that strangers have not. to visit. to cut the wood dig the mines &c up each to the centre — if they were to be considered as the owners of the land on the same supposed above A would own the whole of the wood mines &c. —

If the person over whose land the road runs only received damages. he would have the land again: but the legislature have provided that it shall be sold: to the adjoining proprietors if they will give the full value if they will not it may be sold to any one else who will give it

1 Roll. 390. 2

The reason is to accustom to these people than Jamy in piece.—

There is one advantage the man over whose land the road passes & the only one is— he may sue at a writ called ad quod damnum: on the roads being discussed to have it sold to him if he will give as much as other people.—

But it is said what do the books mean by saying that the adjoining proprietors have a freehold in the land— It is a freehold because the right may last for life. i.e. as long as it continues a highway. But as soon as B sells to the fence it passes to C. The right given the adjoining proprietors is for their convenience to secure public peace. It is a singular kind of estate truly but it is a good title for if any one should commit an act that is wrongful to trespass he may be sued by him who owns adjoining to where the trespass is committed. There is a stat of Geo. 2 when all the principals mentioned above & is only declaratory of the C.L. generally 3 Bac. Ab. & it is remarkable when they are speaking of laying out a new highway to pursuant to adjoining proprietors the right to the wood. mines you will find all those rights & no attempt to confined to adjoining proprietors for when the road is discontinued the land is sold.— And. no legislature under heaven

The law is conclusive that there is no proprietary ownership after the road is shut up. —

1 Rich. 2d 390

Can sell a man's land without his will. And so it is done by our legislatures. — So in Hartford the old streets were sold which would never be known if the land belonged to the old proprietors. —

The principle is to make the old highways keep new ones every body's right is secured — The old proprietors relinquish all the right to the roads by selling lots as any land holders do — Are a T. man bro. by the encroachments of an old proprietor to remove a house the T. would not sustain it. — If a river changes its channel the new channel is the highway — Upon conviction for a nuisance the convict is not only fined but is ordered to remove the nuisance if he does not it is contempt of C. 1 Roll. 82 1 Hawk 200.

Of narrowing highways as where the road is needlessly wide. this is different from the other: it is not shutting up the highway — The adjoining proprietor cannot have the first offer. suppose he could not buy it. being poor. he but the land after the highway was laid out & gave as much as any one for it as he would have done if there had been no highway — Now if it is sold to some one else how shall the old proprietor get out. it is different from a case when the highway was laid out after the land. — He ought to have a right to

become out & the public ought to have a right to use the land.— The purchaser will not take a right of way to him. I know no other way but to allow him a right of passage by selling it with a right of easement— or I suppose the law would give him the right of way if it was sold without reservation.—

In all my practice I never know of a case where the new highway was not appraised at its full value where road was to be laid out sometimes damages were allowed on account of the increase of fence & sometimes the benefit of the new road is set off against the damages. By G.L. if any injury arises from bad roads or bridges the district must pay it. And we have a statute that if the surveyors have notice of the bad road in writing double damages may be recovered.— We have one odd statute on this subject as we have several other odd ones which gives $100 to the relations of a man who is killed by a bad road or bridge.—

This right and liability is transferred sometimes to Turnpike companies. when the directors have nothing to do with the road unless the Co. only engage to make the road & not to keep it in repair— If the new highway leaves the old road the Co. must build bridges &c. but if it follows the old road over a river the

district is to build the bridges — it is at present when bridges are erected in the grants — It has been determined that bridges over rivulets are a part of the highway different from bridges over rivers. — If a highway runs by the side of the river the adjoining proprietors own to the center of the river — Furnishing with the above reflections and that too [illegible] of Gates come under the same rules of law as other highways. —

Of the Stat of Limitations

There was a decision of the national court a few years since which I conceive perfectly correct.

These stat. are made to prevent persons recovering on their claims, after a certain length of time — The Eng stat respecting contracts has been copied by almost every state in the Union: by that every simple contract is barred after a lapse of 6 years with the exception of prisoners &c. — What I wish now to point out to you is those cases when there can be a recovery although that statute has been applied to the contract. —

The most generally entertained idea is this that length of time would bar a recovery at Ch. upon the presumption that it has been settled — The presumption is reduced to a certainty by the stat which only shows the length of time that operates. so that as by L. L. any thing that would remove the presumption prevents the effect of the stat. — So that it would have been in vain to have pleaded the statute as he was a bankrupt — but latterly became owner of property — Or if the Plff had been out of the country so that any thing which destroys the presumption legalized by the statute — an endorsement on a note or a promise to pay, have the same effects. The statutes appear to me to be founded in policy to prevent unrighteous claimants & too great delay in the act.

thereof of accounts — The statute provides that all actions on simple contract to be brought within 6 years after the cause of action arose & not afterwards —

1st A promise to pay the debt after the six years have elapsed will take the action out of the statute.
2d The action is in such case brought upon the original promise & not the new one —
3 If the promise is conditional as "I will pay the debt if you prove it" this takes it out of the statute as much as a distinct promise.
4 A partial pay[t] after the lapse of 6 years
5 Is a case about which there is now contradiction I give it as [illegible] tho I think it not correct. If there is a joint contract & one of them pay it it takes it out of the Stat as to both —
6 Is a bare acknowledgement of the debt without saying more
7 Is when the debtor acknowledged the sum £20 but said the Stat had run & you cannot recover: however I will pay you 10 The 10 was recovered but no more —
8 Is Where a man devises all his debts to be paid without specifications all those barred by the statute must be paid as well as the others.
9 Is an insolvent debtor who is released by Act of legislature & afterwards acquires property and

advertising to pay his debts he is as much bound to pay them bona as others.—

10 Is where a creditor whose debt is barred by the stat. petitions for a commission of bankruptcy & the debtor did not object to it the commission is a good one.—

I will notice the three opinions — The first is that the stat presumes debt to be paid after 6 years.—

Another is that you have nothing to prove but debts only which is much like the first.

the last is that the stat is void no one is obliged to take advantage of it if he does not waive his right he may acknowledge as much as he will & is not be liable.—

The first hypothesis does not appear reconcilable with the decisions. for where a man dies his debts to be paid then is nothing which shows the presumption removed. if the debts are specified as a particular bond it would come within this theory — but generally the Ct would be directing a thing plainly contrary to law as he directs debts to be paid which by this hypothesis the stat presumes paid. & according to this those debts are to be paid which the will legally presumes paid. — Of course the law does not presume any such thing & the principle is incorrect. — So in the ninth case it

this could not be the principle for if the pursuance thou paid thy are no longer debts. The next principle is that if you prove the indebitatus you recover the statute. according to this if it says I owe you 10£ but it is barred by the statute & I will not pay you could recover but the case in the books are directly agt. it. the law raises no promise. If this principle were correct no action could be brot. upon the original cause of action. Case a man brot. an act. to recover a debt that was barred and the deft. acknowledged the debt, & promised to pay it & T off recovered. so that the action was brot. on the orig. promise. It is said that your cannot take for which it is brot. by the Eng. act. of indebitatus assumpsit then would be a debt were it not for the above. case & a few like it —

The true principle I conceive to lie in a waiver of the statute. — viz when there is a promise to pay &c. so if statute acknowledges the debt & says nothing more as to objecting &c. This principle is exhibited in the case where the deft. acknowledged he owed the debt would pay but for because the statute runs agt. the debt that was bought enough to pay 5 or the which the plaintiff waived to that. —

On this ground we can explain the decree of the Chancellor in the case of the will

So of the case of the insolvent who advertises to pay all debts

So the case of the petitioning creditor in which as the debtor did not object he was considered as having waived the statute.

The case of part pay[t] is the same in principle. — There is another case if a debtor does not plead the statute he has waived it & cannot resort to it under the gen[l] issue. —

Every case that can be found in the books will comport with this principle. —

"We have a stat of limitations which fixes the time for actions on bonds at 17 y[rs]" One of our courts decided that a promise within the 17 did not take the bond out of the stat. and on a[t] on the promise was recovered because of the former decision. — this point as to the waiver was finally decided by our court & entered on the record. —

As to a joint contract the decision appears to me incorrect which determines a partial pay[t] by one takes it out

as to the other. — If it does one is deprived of the benefit of the stat without having waived it. — according to the decision in Doug it waived it as to both. which is not reconcilable with the case in Vantrijp.

The law to presume the stat notice is to consider it a waiver by the party & him only & a promise to pay it — & a suit & application might be had on the new promise & the original contract set up as a sufficient consideration. —

Of the nature of the plea. — Suppose a man in N.Y. is sued on a bond he can recover at any length of time. But in Ct it cannot be sued after 17. Now is a judgt in Ct a bar to a suit in N.Y. — If the judgt had been on a plea of money comps to the judgt would be a good bar — But the case supposed has not been determined. — So when a note is sued in N.Y. by 6 yrs to —

My opinion is that a plea of the stat is in the nature of a plea of abatement & this was the opinion of Judge Chase & so it would

suits answer as a bar in the two cases supposed above—

2 Burr. 1099. This relates to interlocutory promise
Gil. Ev. 47. Is the case
Pr Cha. 386 Is the case of wills
Public 385 Is the case of the advertisement.
*/. Salk 29. 425
Cro Car. 144 [illegible] et inveni. - vide vide. 115. 199. 163. 294. 295. 381. 4
513. -
Cro Car. 160
+ Carth. 471
Mod. 105
Mod. 426
2 Wils 135 - 345. -
1 Vent: 90. - 2 Vent. 191 contra. Doug.

* 4 & 29. Conditional promise prevents the operation of the St. - Heyl vs. Hasking. - H. 424. Vol 2. Matthews vs. Phillips. During proceedings court, the six yrs. expired. Defdt. pleaded St. Plff replied that St. had not run upon the debt before the commencement of the a & so recovered. -

+ All the judges of England such as Serjeants Jun & all agreed that the conditional promise "Prove the debt & I will pay you" (on that condition performed) prevents the bar by the St. & that a bare acknowledgement of the within 6 years of the action is suffict to revive it. Hct.

See also see Holts Repts. 294. - St. cannot be given in evi on gen. issue, - but on nil debet it may be pleaded.
ibid. 427. -

There is one other difference with respect to the [illegible] in action. The C. L. gives no aid to the assignee. By Eq. If the assignor covenants with assignee as to collecting the bond & using the money, if assignor interrupts the suit on the bond it would break the covenant. But this remedy being inconvenient Eq. said that if the payor had notice & still paid the payee & took what he should upon suit. But by all. Eq. choses can be transferred so as to convey the legal title & revise a contract between the several parties to the instrument — a further ground of difference. By C. L. if the contract was not sealed the consideration might be enquired into. But by all Eq. after negociation nothing can be proved as to the consideration — the thing is just the same as C. L. specialty. At C. L. no illegal contract can be recovered on. But by all Eq. if title has been negociated & it is not void of a transaction declared void to all intents & purposes by statute is valid.

Agt. There are contracts in Mr E good where there is no consideration & more was given & yet at C. L. no such contract is good. — This is for the advancement of commerce. — As to how there is an acceptance upon protest. — This is certainly a plain difference that you cannot by C. L. subject a man by courtesy.

I do not know of a State in the Union where fraud is made use of to avoid a contract entirely except Conn. & even here it only reaches those cases where the consideration is of a most trivial kind.

For drawer with to drawee who promises to accept & then the drawer injures money by showing the drawee promise — This shews a third person concerned. which is always the case. where more is the contract executed good without consideration.

Another difference is that by C.L. in case of fraud you recover the damages & keep the article whereas I think the just remedy would be to make the bargain voided & void — This however is the rule at L.L. where the fraud is in the consideration. However if it is in the execution of a contract the contract will be void and void & making a bond among to cheat one ignorant obligor —

By eL. L. if there is the least equivocation trick or fraud or any thing that the most scrupulous integrity would practice the contract would be void intirely — The speculative opinions of a man must not be told as that a man will be declared & the legal matters of fact he must set as that case has been declared at L.L. if you have an Exn. ag.t A. B. & C for the same debt if you imprison one & discharge the other by eL. L. you may take all till you get the first & discharging one does not discharge the other at all.

By L.L. contract by which property is agreed to

be conveyed & the property passed. the contract is entitled to all incidents & purposes. Lyte by all C.L the merchant may if fraudulent of the buyers failing stop the goods in transitu. if however the goods get into buyers possession or in his will or team the privilege is gone. —
Merchants are never joint tenants, but tenants in common. so they have no survivorship.

Nuisance. — There is no definition — it is something that annoys it is said. but this is indefinite. It must be an annoyance and that is consequential on a wrong or it is said a right act. a man may build a dam on his own land if he raises it to injure you you can recover not for building the dam but for the injury consequential by an action on the case. — 5 Co. 101. 2 Roll. Abr.
Stopping antient lights. this applies principally to the county. — What are antient lights is a question. 20 yrs standing is antient enough. 9 Co. 58 1 Vent. 237. The meeting appurtenances words: prior possession is all important in this case. Hutton. 136 9 Co. 59. 1 Co Ch. 500. Palmer. 539. To corrupt a stream of water — all this depends upon prior occupancy. — To changing the course of antient water courses. — In our county it is customary in N.S. to give land for a mill to erect a mill

4 Bro 2141
3 Lev 209

6 P. 373
1 Salk 460

6 co 64. 155

6 com. 10

he builds at just upon it I think it would be a nuisance to take away his customers if he does his work well by building near — it is analogous to the case of fairs which is generally a thriving good — If the injury is to the inheritance the remainder man has the action. if to the possession the tenant has the action. if to both the action belongs to both.

By an action of nuisance you recover down to the time only & may bring a new action every week but it is not of the nature of actions of slander &c. — It has been attempted to make it nuisance to intercept pleasant prospects but did not succeed — The building can be done away — but by one man it may stand the nuisance but does not take away your right of action. If however it is a common nuisance no one brings an action but the one injured — Suppose a man indicted & convicted for nuisance if he does not remove it the D. grants Exn. to Sheff to remove it at the expence of the annoyer — In a private action title & injury must be proved. 1 Show. 366. L. Ray 1568 In the last cited authority it was determined that when the water was in the house was turned off both tenant & him had a right of action.

Of Executors & Administrators

Preliminary remarks. Where a man has made & duly appointed an Ex^r & dies: to this Ex^r is committed the management of the Estate: in him is the legal title. Where there is no will the court appoints one Administ^r who has the same title to the personal property, he is a trustee and has no beneficial interest in it. If injury is done to the property Ex^r has an act^n & both are liable to pay debts to the amt of the personal property. & this maxim is one universal one that a man must be just before he is generous. and no volunteer can take to the prejudice of a creditor. —

When the debts are paid the next duty is to pay the legacies & if any be still in residuo unappropriated the question is what he has to do with that. — The duty is the same as to pay of debts of a bona notabile. he can have no wisdom the law directs what is to be done. — Ex^r has an intitlement to this residuum by C.L. — As to the residue in hands of Ex^r & Ad^r they have always the same formally the Ex^r held it. because no one had claims to it. I would observe that in those countries where the C.L. prevails the Ex^r had no pay for his own labour & so when there was

a residuary legatee he gets no pay at all, but Administrators get day wages as much as any body.

Ch J. interfered in this business & held the Ex^r to be a trustee if he had a legacy given him in the will & the residuum was considered as undisposed of by the will. the legacy must be reasonably to reward the Ex^r. or plainly sufficient for that purpose for a nominal one to buy mourning &c would not suffice this the court held it was to be distributed as if there were no wills.

This you will observe is an equitable construction & may be rebutted by parol testimony as the conversations of the testator shewing him to intend the Ex^r should have it. The legal construction is that Ex^r shall have it & no parol can be admitted to shew the testator did not intend the Ex^r to have it.

There are doubtless great defects in the Eng. C.L. as to the disposition of dead mans estates.

As to the real estate if there is a will it vests in the Devisee. if there is no will it vests in the heir & this descent is immediate.

I observed that the personal estate is the fund to pay debts. and so is the real in some cases. on bond debts &c. & the statutes are not obliged to call upon the heir. All specialties must by Ch. be paid first. so if a man owing property abundantly sufficient to pay his debts which are also simple contract debts. the personal property will not pay more than twenty five per cent. so that many honest creditors are defrauded.

Where a specialty creditor refuses to apply to the heir the Ch. of Chy will let in the simple contract creditors to the amounts of the specialties. this was introduced by Chy & was called marshalling the assets. - & it has remedied a very great evil. in many cases Chy did not consider themselves as encroaching upon the law for the real property was really so far liable.

The way this difficulty is avoided by gentlemen of honour is to devise a quantity of land to pay debts. - & Chy orders a sale.

This title of the heir may be ousted by specialty creditors. & the case is the same if against if these creditors do not choose to take it the Ch. of Chy will let in simple contract creditors

I must observe here upon a very considerable [testator] head of wills. — As when the [testator] desires a certain quantity to pay debts, the will [is so to be] construed that when there is a deficiency of personal property & then only is this land to be sold, but with us the decisions have been uniform that the land shall first be sold when it is so devised to be sold. & the personal secured for the wife & children. — Suppose the heir should sell [& make] the land. the courts make the heir personally liable, but the purchasers title is not disturbed

The real assets is a fund to pay certain debts if called upon. the personal assets is a fund to pay all debts. —

You see there are cases in which it is necessary to go to Ch[y]. to get payment of debts. there are a number of such cases. As in case of an equity of redemption. so if there is a person appointed to sell & he will not. there are other like cases in all which the assets are equitable being made by Ch[y]. out of which all debts are to be paid pari passu. but all assets got by application to law are legal assets. out of which debts are paid according to rank. —

There is an important rule I would be glad to have you fully understand. When you are obliged to go to Ch[y]. to get the money it has always been considered

It is said in the books that the Executor is liable for all contracts but not for torts.

as equitable assets. But here is a question lands are devised to be sold the Ex^rs ~~cannot~~ without doubt or semble sells the land & the money got for the sale equitable assets or legal. The moderns opinions say equitable. On this ground that it may be necessary to go to Ch^y. to get the money but if it could be acquired at law they are legal assets. this then is the distinction. -

The great point in which the laws of our states differ from the C. L. is that they make the land liable for debts by the way however they make the personal first liable & the real property does not descend to the Ex^rs. the title is in the heir liable to be defeated however. Our practice is to sell or apply the personal & then the Ex^rs get an order from the Ct^s. of probate to sell real property & in this way get the same authority as by the will of our worst Englishmen by which he devises lands to be sold for the pay^t. of debts.

The Ex^rs. is always liable to the extent of assets & as Ex^rs no further. It is not true that he is liable in all cases where the testator was. - He is not liable for torts. as a general rule formerly no personal act^n. would lie at all. from the maxim that the personal act^n. went with the

The action by Co. must be limited to a case and not as for a tort. This principle was definitively settled only until a case in Comp.

person — often and it was decided the Ex^r would be liable on all contracts. The inquiry is was the testators estate benefited by the act done if it was the Ex^r is liable if it was not then benefited the Ex^r will not be liable. the act^n goes with the person: as in case of slander, battery &c. The question is not whether the rule is reasonable it is whether it is the principle. If A had shot B's horse. C. of B's Ex^r is not liable. it is a tort. but if A had poisoned B's horse C would have been liable but it is a tort. so that the distinction lies not as between contract & tort. but upon the principle above mentioned. It seems as if the rule should have been that an act^n would lie in all cases when the effects of the party injured were destroyed.

But suppose the party injured died. the rule was that no act^n could be brought the act^n died with the person. but by a stat of 4 Ed. 3 ch. an important branch. an act^n could be brought by the Ex^r of the party injured, and so to test the question is whether the effects of the deceased were lessened by the act done. that is was the value of his estate lessened.

Dower is a species of property that goes to the wife it is her paraphernalia. it vests in her. it is her cloathing & ornaments. while the

The husband has no power to devise away the paraphernalia of wife. such devise is void The wife has been considered in some cases as the creditor of the husband having a lien upon the real estate. as far as the amt of the para. & sustenance is made by Bl. & Wd. between jewels &c & necessaries & say that she cannot hold the former as creditor. see on this subject. 2 Wood 405 6. 1 P Wms 729. 2 Atk 79. 3 Ab. 6. 2 Vez. & 2 Atk 105. 2 Bl. 936. 2 Wood. 465.

they belong to him, but when dead
husband is living the duty & incapacity bridling desires
absolutely & she may go directly into possession & hold if
there is other personal property sufficient to pay debts for
she has preference to volunteers.

The extent
of the Ex^r liability is the amount of the assets of the per-
sonal property. He may however be liable for misconduct
& negligence in management.

There is apt to be some confusion
when it is laid down that Ex^r is bound to account for all
the goods that come into his hands it is however true that
word apply is technical it means avail of the property
& when he has paid all the claims duly presented as
administrator & if he has wasted any action lies against
him viâ as Ex^r however. being answerable on the bond
as for waste. but as Ex^r only for the assets and for all personal
property personally.

The only ground for
making them liable is that they come into his hands & as
fiduciaries & he must act accordingly and if he thereby
be guilty of devastavit it subjects him. so if he pays
debts of lowest nature. The appraisal is only of consequence when
the creditors take the goods. Allowing funeral debts & legacies
the Administrator is to distribute according to statute.

It is
said that if a debtor is made Ex^r his debt to the
testator is discharged this doctrine at first was literally
true. But when the practice that no voluntier was to

take to the purpose of enabling the county both that it was unfit to pay duty. afterwards it was said that it was also unfit to pay legacies. all the advantage this is that if both duty & legacies are paid he takes it. however if he sues a legatee by the will he must proceed by Sci. fa. to distribute it as Executor is. By this we get at the principle upon which he takes the assurance.

By C. L. no Ex. is under obligation to give bonds for the faithful discharge of his duty because the testator placed in perfect confidence in him. but the intestate placed no such confidence in the Admr. & he is bound to give bonds Chancery have assumed power to oblige the Ex. to give bonds & even in some cases as when he became dissipated, drunken &c. (common) & the same power of removal is exercised by our prerogative courts as Admr. but the of removing Exr. is exercised by Chy. in Eng. in some cases.

If there is no Ex. appointed an Admr. is appointed by the Ct. cum testamento annexo & have the will is to annex this grant as if he were appointed by the will.

Person's property on state. it was held that looking glasses &c were not being part of the freehold. but it was determined that if they could be removed without injury to the freehold they are personal property & goods

Grimston & Cole disputed whether parsnips were personal or not. the law of emblements decides things of this kind? the principle of it is that the power is entitled to the crop or not according as the contingency which is to end his estate is within his knowledge or not.

A will is only direction to the Ex^r no technical terms are necessary to constitute a will. 1 Lev. 177. 1 Com. Dig. 2d 34. a proper & entire intention according to law to become after death & not before it is a will. it is ambulatory till then. Lev. 2 Vez.

Pigg occurs on which Sel^d shows a power to Ex^r & how it is that they are trustees. 1 D. Wms 331 3 ed Atk 526.

Strictly speaking devise is of land and legacy is of personal property.

What Ex^r powers is over personal property only Com. 21. to 28. It is said that Ex^r has no power over land & it is true that he has none as Ex^r any body might separately take that power he does not pay out the money as Ex^r do according to the nature of debts but pari passu If no person is named to sell it is said that they sell tho' he has no such power expressly given as Ex^r Pigg is founded on the presumed completion of testator in Ex^r

dant still the property is sold quite equitable assets.
The heirs & devisees title commences instantly on the
death. but the legatees title does not for the prop-
erty vests with the Ex & he must assent to it:
& if he thinks fit he may sell a specific legacy
& he shows, tho he may be obliged to account
for it. & may take away one of such specific
legacies. & the purchaser gets a good title. 1 Dyer
252. Vaugh 93. 3 Bac Ab 87.

That a specialty creditor may
resort to the Ex or the heir see Vaugh 93. & if
they go to the Ex the 6th sect in the statute
restores to the amount of the specialty. 1 Eq Cases
Ab 24. 2 Vern Ca 57.

The heirs property is taken
& sold & if that is not enough it is divided. but
if one spec. creditor did not get all his debt
he will not
be allowed to come in and take a dividend with the
simple contract creditors until they have each
as much as he has. each of them.
All debts
are alike with us & when the estate is insolvent all
the estate is sold & an average made.

Lands are divis-
ible to Ex to pay debts. question was whether the sale
laws were legal or equitable assets. they were said to be
equitable. 2 P. Wms 416. 2 Vern. 106. 1 Comyns Dig. 401

Real estate are not got to the hrs or devisees & in their hands are subject to specialties pay^ by Ex^ only. Ex^ & Adm^ are liable for all debts.

A. to what constitutes legal & equitable assets depends upon the nature of the property, see hereon 1 P.W. 430. 3 P.W. 341 1 Veg. 61. 1 Vern. 411. 2 P.W. 416. 1 Salk. 484. 63. 1 Bro. Ch. 135. 137. 140 Co. Lit. 112. Bacon.

A testator devises some of his lands & left some to go to his hrs. it has been settled that the devised lands are first to be applied to the debts. & also that if there are some lands devised to be sold & left some to the hrs the devised lands are to be sold first. the distinction is this whether the devisee has a beneficial int^ 3 Atk. 526. the rule all aim at the intention of the testator. which is the paramount law in all constructions of devises.

It is not uncommon for the testator when he gives away his property to charge the devisee with the pay^ of certain debts & legacies the estate being real the heir is charged with debts the creditors whether simple contract or specialty can come upon him for the pay^ he being considered trustee. & if they go to the Ex^ & he pays them & there is nothing left for the Legatees. Ch^y will force him to pay the Ex^ the amount of them

The body of a debtor was not originally liable to an execution
Plowd. Rep. 44. Hob. Rep. 60. 3 Bac 25. 29. 2 Lev. 238. 9. 1 Vent. 130.
and when the heir is bound. or neither when the obligation descends
with the land. his body cannot be taken in Ex. the Ex. is ag.
the land only. 3 Bac. 25 Co. Lit 103. 290. Dyer 62. 81. 207. 15.
The process of the debtor was first subjected to Ex. for debt by stat
25 Ed. 3 which gave a capias ad satisfaciendum. 3 Bac. 329. 331.

legacies. — So the Ex may file his bill for the purpose agt the Heir or Devisee.

I would observe that this is the only case where according to the E of Exon you can bring your suit directly against the thing charged with payt of debts when he might have waived the devise in which case the Exr is to be sued

Tho E of Ex is as a general rule is to be tried by the Ecclesiastical courts, but there are cases where he is not, as a contract with a Painter to paint &c. as the contract is purely personal. So when a man either expressly or impliedly engages to perform an act for which no act only as the way to get from the performance of the Contract by Exr as in case of a Shff. this E of Ex cannot be tried for as in case of an adultry who undertakes to collect a note where there is to be no dispute Dyer. 14. Eco Ch. 187. Cro Jac. 553. Fyler. 183.

The Heir is not bound unless the contract is a specialty even tho named neither is he bound by a specialty if not named. The manner of discharging this is by a judgt really agt the Land which is appraised off until debts paid — I wd observe here that no Land was by C.L. subject to debts until the statutes made them so, which were only to extend the Land, Jenk Centuries 283. 12 Co Rep 150. 3 Co. 12. Moor 203. Cro Jac 450

Charging Ex^tr in the debet & detinet is ill only on spec. assumpsit and is cured by verdict under Stat 16 & 17 Ch. 2

The Ex^tr or Adm^r is chargeable in the debet & detinet in case of a devastavit, that is after judg^t against him as Ex^tr &c de bonis testatoris, for he shall not be charged with a devastavit on a mere surmise. 2 Bac. 444. 1 Sid. 398. 1 Rolle. 603. 5 Co. 32. 1 Vent. 315.

The heir must be sued in the debet & detinet, because he has in his own right & the debt descends with the land. 3 Bac. 29 5 Co. 36 a.

Where an Ex^r is sued it is not stated debt but only that he detains it. that is distinct.

There are cases in which he is to be sued as debtor as where the Ex^r kept a term for years, when the testator might have paid all off to his creditr. the debts then were due from the testator the Ex^r may be sued both as debtr. So if rent accrues to the Ex^r as well as all other debts that accrue after testators death may be sued for by the Ex^rs instituting declaring in the name of Executor. this it is not his plea.

Ne te sue for a declaration when the facts are so test & waits as to destroy your chance of recovery you may sue in in the debet. 1 Mod. 315. 5 Co 32. 1 Ld Ray 398.

At C. L. the heir when he was liable could defeat the creditor by alienation. but by a stat of W^m & Mary the creditors can follow the money the land not being liable in the hands of a bona fide purchaser Coutth 245 Co Litt. 102. 1 P W^ms 777. 1 Eq Ca Abr 149.

It has been a q^t question whether the Ex^r could ever be bound by testators himself, when the testator, in his life time was not bound as if the bond was to be paid after his death it has been held that he was. I see no reason why he should not be, as when the Ex^r was contented to be bound by a bond given to provide for the wife after the death of the testator. Afterwards L^d Kenyon decided him not to be bound Dom. N.C.

All persons who can make wills may be executors, many others

Lov. 155
Hob. 250
2 Bac. 375
1 Com. 235
Co. Litt. 124.

A devise is in the same situation as the heir & is also bound being made so by stat. if he parts with the land.

A devise of lands for pay^t of debts. Qu? could the specialty creditors take advantage if it had been devised to a beneficially they could but here it was devised to pay debts & it was determined to be equitable assets & for this reason it could not be thus taken. 1 P.Wms 230. 776

Who may be an Executor

There are apparent contradictions on this subject in our books it is said that a traitor felon &c may be an Ex^r in another they cannot. the reason is that by Civil Law one may not be an Ex^r whom by C.L. he might. C.L. rules are primâ facie our law.

There are scarcely any persons who are not be an Ex^r. Even villeins, infants in ventre sa mere could & left the mother had no power as an Ex^r 2 Bac. 317.

Civil & C.L. agree as to infancy but he cannot act as Ex^r until 17 years old & if before that age he is appointed, the Ex^r appointed can administer during minor state & the acts of the infant Ex^r done before he is 17 bind no one. After he is 17 yrs his case is different from the Ex^r any act that is the Ex^r may do a servant can't is not such in him. but if he dies

An Ex under 17 cannot sell testators goods or apart to a legacy and he is bound by such agent even after by unless he has apptt. - 1 Cha. Ca. 257

1 Fonb. 70
Ca Eq. 254
Lee. 155
Co Lit. 112

charge on good consideration it is binding. that is all the acts proper for an Ex^r to do & do not impose him bind him. — 5 Co. 27. Cro Chr. 490. 1 Com. 249. 2 Bac 378. Cro Eliz 671 There is one case that says that an infr. Ex^r may sell goods to pay debts but it is contrary to rules for he is no Ex^r untill 17 yrs.

The infr Ex^r tho of power to act as Ex^r at 17. yet he must be sued by guard^n. There is no case establishing that where Defr. that he can be compelled by prochein amii

Suppose however he should recover in a Suit by attr. & not by guardian. it is said the judgt is not nonus but if an infr. about recovers then it is. — the reason is this if there is any thing that an infr. attr cannot act untill he is 21. I take it the infr Ex^r could not then recover before he was 17. 3 Bac. 150. Cro Eliz 541. The might now properly be called void. not nonus judgt.

If an infr & about are both Ex^rs it is said they can both sue by Attorney. 1 Vent 112. because it said the about cannot make an attr for both Stra 784 2d Roy. 232. 606. 1449.

But if they be sued the infr Ex^r must appear by guardian there appear to be practice rules. 2 Bac. 151. Stra 318. 3 Mod 236.

Case of a married woman we find it laid down

By C. L however the wife cannot take upon herself the office of Ex.r without husbands consent.-

2 Bac 378
Godol. 101. to 110.

being then considered a form only
that she may be Ex^t this is by Spiritual Court but by Ch
the ecclesiastic. but if there is no objection as to spir
itual court have the cognizance of testamentary business
unless certain testamentary character. 2 Bac. 378. 1 Salk. 117. 1 Com
235.

If the husband dissents & the spiritual courts
should take to compel her a prohibition will be issued
She cannot be compelled to act. the consent of
both being necessary.

Suppose the wife consents & the
husband dissents. the law is. that if she act as such she
is bound by them & still she may dissent.
The fact is if she does not dissent it is con
sidered as a prosecute.

Suppose the wife appointed Ex^t
& proceeds with her business, as such her husband does
neither assent or dissent. they cannot plead that
they are not Ex^t on the same ground, which
would bind the husband. 2 Bac. 378. Godol. 110.

A young woman is appointed & then marries
her husband commences & goes on she not dis-
senting the rule is the same & if he dissents
must go on with the duties of Ex^t.

The rule is
well established that the consent of both is required
& the only question is what is Consent.

2 Bac. 375
Co Litt. 128
1. Rolle. 914

A feme covert may make an Ex^r of her debts as Ex^r of another. 1 Roll 688. 1 Mod 211. 2 Ch. Ca. 92. & the husband's consent is not necessary for no marital right is affected.

A corporation aggregate cannot be an Ex^r. 2 Co. Litt. 66. the punishments of excommunication could not be inflicted for breach of duty in such capacity. no oath.

With respect to aliens, traitors, felons, outlaws, & c. they cannot be Ex^rs by some authorities. by the civil law they could not. The Eng. Laws do not disable such persons from being Ex^rs because they claim them in autre droit.

Ex excommunicate cannot be Ex^r & this is the only case of a person's deliberately renouncing an office of Ex^r. the ground is that originally Ex^r duty was to dispose of goods in pious uses. Ecc. Litt. 3 L. Cas. 85.

As to aliens. the alien can inherit no real property yet he can be Ex^r for he holds in autre droit 1 Com. 235. It has been a question much debated whether an alien enemy could as Ex^r maintain an act^n the current of authority is that he can. 2 Bac. 375. and it has been but lately decided that an alien enemy could not maintain a personal act^n

Idiots & lunatics it is unnecessary to state cannot be Ex^rs & if an Ex^r becomes a lunatic or drunkard unable to do business the Ct will deprive him & admr committee to another. 3. Bac. 376. Salk. 36. 3d. 2. 8

But Ex^r being poor is no objection to them — Nor can the Ecclesiastical courts compel them to give bonds but Ch^y can. Cartt. 457. 1 Salk 36. 297. 2 Ld Ray 861. 2 Vern 249. 2 Bac. 377.

And even when there is no evidence but only grounds of presumption that Ex^r is in failing circumstances the L^d of Ch^y will stop the proceedings until the question is decided. — and Ch^y will exact security of the Ex^r is waiting the appeals 2 Vern 249. 2 Bac. 377. Cha. Ca. 171

Who may be administrators — & how appointed. —

An Adm^r is a person appointed by Law to manage the estate of a deceased person: (personal estate) This takes place when there is no will or no Ex^r appointed by it. or he refuses for completion, or becomes incapable to act as Ex^r

A person can be an Adm^r under 21 years. a person under 21 may be one designated by Law but he cannot act until of the age of 21 yrs. It is said that the reason is that an inf^t cannot give bonds. but we admit Ex^r of 17. besides if the Law says he must give bonds the bond holds. the Ch^y takes the bond Ch^y compells Ex^r to give bonds tho by Law he is not compellable Tho in some states they are required to give bonds by statute 2 Salk 39. 2 Bac. 381. Lovelapp 5 Ecatt 246 3 Mod 295. Sometimes the Law has provided by that Adm^r shall be put into by certain persons as of Adm^r the

1 Com. 202. 249
2 Bac. 413

1 Vin. 309
Cro Eliz. 208
22

has been adopted by almost every state. that admr shall be preferred to the widow or next of kin. this is to be understood with qualifications. it amts to this that if there is no special direction to such persons they must have it. It is an office and the Ct are to exercise discretion about it. it is not a matter of right.

All most any body may be admr if they are of the legal description or they send to Eccl Ct such or others &c. Nothing but a married woman as such. it is subject to the same law as in case of Ecct the consent of husband or wife as to the incapacity.

A feme sole Ecx comments devastabit & marries the husband is liable as for all other wrongs done by the wife if sued during coverture. In this case the creditor hereby allowed in Eq to follow the assets into the hands of the husband of the Ecx (But he cannot be thus liable for the wrongs committed by the wife). The way to get at it is to consider him as an Ecx in his own wrong or have an admr appointed de bonis non & have him sue the husband. 1 Bac 293 Mow 761.

D.S. marries L.R. she is the Ecx of W.C. L.L. Lewis go on with admr. she dies - if he take the goods to his own use he is Ecx in his own wrong

History of Administration

Originally no such thing was known as an Adm.
It was pt. of the prerogative of the King as pater
patriae to take upon the goods of deceased persons
& to commit them to persons to dispose of the law
dinarily. it was granted to Lords &c. The King
finally granted all that remained to him of
that prerogative to the Bishops. — The law as it
then stood was: 1/3 went to the children. 1/3 to the
widow called the rationabilis pars. the other
1/3 being what the decd. could dispose of by will
belonged to those who came entitled to it by will.
& if no will to went into the hands of the bishop
but then was no law to compell payt. of debts
as the Ecc. was if there was a will. this was com
plained of as unjust that their property the Stat
13 Ed. 1. West. 2. gave the first check by obliging
the Bishop to pay the debts as far as the value of
rats. — being placed in the same place as Ecc.
& the stat gave an act. ag. them. the wife &
children had the rationabilis pars — but you
will observe that the surplus after debts pd.
remained entirely in the power of the Bishop
this provided for the stat 31st Edward 3d
which obliged the Bishop to dispose to next of

a most lucrative source of the Ecc. to administer
Phill. R. 498. Lovelace v. Lovelace. 2 Ves. Jun. was the statute of Dist.
Three persons were appointed
to sup. the intestate as to his personal property. of the
this the Bishop was not liable. — the Adm. was
placed in the same stat. as Ex.: might be
sued & sue in the same manner.

But you will observe that this stat did
not oblige him to distribute the surplus on the
ground that there was no such thing as compelling them to do it. This took place at
the stat of Car. which is the foundation of all
subsequent laws on this subject. The wife did
not get any thing or the children until debts pd.
when she got 1/3 & the children the rest. she to be
sure had a maintenance for a short time by the prog
ative courts.

Adm. is granted by the Eccl. courts in
Eng. In U.S. there is a distinct courts for prov
wills & granting Adm. called Surrogate &c.

Who are entitled to Adm.

As to persons entitled to Adm. the stat of 31 Ed. 3
directs the Ct. to grant Adm. to the next & most law-
ful friend. the Ct. understood this next of Kin except
when the wife died or husband. — the appt. there
has of the next of Kin 1 Com. 261. 9 Co. 39. 2 Bac. Abr.

Lovr 2. Vt Ray 495.

It seems if there were several next of Kin the Bishop might appoint one or more or any of them at his election.

The stat of 27 Hen 8. gives it to the widow or next of Kin & d. believe this accepted by most of our States & is to as C.L. unless altered by our stat. by this it was thought next friend to next of Kin. the words were in Latin propinquo sanguine. meaning next of blood. — how came it then that the husb. can claim Adm. of his wife? I can only say from continued usage. for in the stat there are no words to allow. but it is well established law. perhaps it may be from analogy. as the st. gives it to the wife I would observe that the st. 2 & 3 Edw. gives the property to the next of Kin & husb. was obliged to distribute. But by 29 Car. 2 the was enabled to hold it & was not be obliged to act. for it. it is very important for some States have not accepted the stat of 29 Car. for it would be nothing against the express words of a stat. You will understand this stat as vesting the property in the husband so that he gets it whether Adm. or not.

Lovr 2. 1 P Wms 381. 1 Vent. 219. That Adm. was not obliged to distribute before the stat. 22 & 23 Car. 2. 1 Lev. 233. & 295. the husband died before Adm. taken out but was possessed of

3 Atk. 762
1 do 453
Parker. 527.
1 P. W. 41
2 Bl. C. 505
1 Vern. 316. 3
425.

et al. 2 Lev. 3. 3 & 4th. 526

So that Stat. shall not take away the right of him entirely it was only given to the Crown

The Ct may grant to either a share or part of him or both as he pleases 1 Show: 351. 1 Vern 315. Lev. 3 1 Sa. & 36. 1 Ther 552 provided always that they are proper persons. —

Of them the next of kin the nearest to the intestate is the computation is by civil law When adm. is granted to 2 or more the Ct may grant several adm. of different portions of the property a bond cannot be thus divided Lev 2 1 Show. 351.

In reckoning next of kin the descending line is to be preferred. If next of kin so that father is preferred to son tho in the same degree — Lev. 4.

As to collaterals you count from the intestate to the common ancestor, & then down to the person whose degree you wish to know. This is the civil law computation which we have adopted in adopting the stat. —

The first then are Children 2 Parents 3 Brothers. Grandfather & Grandson 4 Uncles & nephews. Then is no difference between male & female as between whole & half blood. it is the proximity & not the quality of blood. —

It has been a great question whether the right of administration goes to representations. It is said that the children who are considered as representations are not entitled as being a degree lower than their father. they are drawn up & stand in the degree of their father. But the statute says nothing as to representation & I conclude it was not contemplated by its framers.
The law forbids marriage between those related in the 1st 2d & 3d degrees of kindred

Persons qualified to be Admrs sometimes refuse, or are not to be found for which cases the statute provides, but it seems that by Ct. a creditor may be appointed Lord. 5. Salk 38. he being interested

When it is said there is no claim for the creditor to be appointed from is no case to compel such appointment that it is a matter of discretion.

If an Exr. refuses to act or dies without having proved a will & has left goods unadministered. the Court must appoint. but the Ecc. do not consider themselves bound by the provisions of the stat. for the Ecc. did not die intestate & the Bp. appoints as the Bishop did before the stat. at their discretion. without regard to next of kin

It is common if there is a residuary legatee to appoint him & some question has arisen whether there is not an obligation to appoint him. but I see no reason for any. for there

is no compulsary stat. It stands on the same ground as the law does on the subject of creditors & he has the same interest. Stra 556 956.

The testator may intend the intestate as to part of his estate. as where there is a residuum unappropriated the Ex^rs used to hold & do yet. — Thus if a man gave so many £. S. d. to each severally. — But if he devised specific property to each & state there is a casch left. he is as much intestate as to this as if he had made no will at all & the wife to an intestate to admon of it. Dyer 372. Show. 2 S. 2 Bac. 386

A reversionary legatee was appointed that died immediately after appointment. It was ad. that his next of kin should be his successor & not the testatory. — The case in Godolphin is that the legatee had the whole estate & his representatives would hold the probate ours to succeed. — But if he were legatee only in common cases I should take it not to be the rule but the next of kin of the testator should be appointed. — In the other case the whole property vests immediately if no refusal be signified to the legacy & it was the only one intrusted. — But in the last, numbers were equally interested with the reversionary legatee.
If none of these characters are to be found the L^d

appointg one entirely at essential —

An Adm. durante minoritate need not be next of kin to the infant or the intestate. 8 Mod. 244 Law 5. Holt. 251 2 Bac. 381

If one is appd. Exr. & he does nothing he is summoned & if he does not appear that his accept. or refusal may be recorded is accommunicatus. 2 Bac. 403 2 Show. 252.

Neither is if the Exr. does not give notice whether he accepts or not within a certain time he is fined.

This trust of Exr. in some cases may be transmitted in others not. Thus an Exr. of an Exr. is the Exr. of the first testator. the reason is that the first test. placed entire confidence in his Exr. for all purposes If an Adm. die his Exr. is not the Exr. of the intestate. in such case an Adm. de bonis non must be committed. Here the intestate has no special confidence in the Adm. so the power must go back to the L. — Whenever there is an interposition of an Adm. the transmission is ab ano ad extremum Love. L. 1 Roll 907. 1 Com. 251. 1 Salk 460. Cha. Ca. 179

Suppose J.S. have two Exrs. A & B. & A dies leaving C his Exr. the whole powers go over by survivorship to B. exclusively — Then B dies leaving D his Exr. the estate not being administered it is the Exr. of C.

But there is a case mentioned. Suppose the case as before except that B died intestate without appointing an Ex:. It would seem that C. ought to be the Ex:.
2 Bac. 405. 1 Salk 311. Talb. Ca. 127. 1 Com. 251.

But where the chain of confidence is broken as above stated de bonis non. & if there is a will cum testamento annexo.

L. appoints A his Ex: & A dies appointg B his Ex:. who is a minor. are A's & durante of B. who is C: can C. administer L.'s estate? B is plainly L.'s Ex:. but he cannot act being a minor. The argt was. B had a right & that C came in the room of B. but he came in as Admr: and we have no difficulty if we do not lose sight of the principle. It certainly was true every confidence in C. neither did A.
2 Bac. 381. Ceo Eliz 211. Hob. 226.

It is said that in case of A's bonis non the D: could appoint as in other cases one more to succeed & to revoke & there is no reason why they should not.

Refusal of Executors

If Ex: refuses there must be an A: cum testamento annexo.

It has been said, that the D: cannot compel the Ex:. to prove the will. but cannot compel him to act. The Ex: cannot appoint another to perform his duties. altho it was once a question.

But if the Ex^t^ or sons the acting one only must be named for the public know no other.

An Ex^r must do some act in the court to be thus recorded to constitute a refusal and declaring a refusal out of court is of no avail. Such a refusal may be retracted by letter — declining not to accept before Ad^r is enough. Cro. Eliz 9 R. Dyhow. 252. 2 Bac. 405.

If Ex^r who is alone refuses Ad^r is granted he can never prove the will. but if one Ad^r is not granted the nonagreement proved —

If there are two Ex^rs and one refuses it does not have any effect both are to be named in the will, the one refusing can release debts &c. And his power lasts as long as his colleague lives. + agreeing to him if he please — But it is not so with us. if one refuses he is in the same place as if he were originally a sole Ex^r 2 Bac. 405. Dyer 160 Hard. 111. 1 Salk 307. Co. Lit 292. 3 P. Wms 251. 6 Co. 70 4 T. Rep. 565.

There is no power in Ex^r to renounce if he has once commenced the business of Ex^r as taking the goods &c. it is not necessary for this purpose that he prove the will. in short all acts that would create an Ex^r ship do some test. Notice given to alter the habitation of Ex^r — it is evidence of his acceptance 2 Bac. 405. 2 Mod. 146 1 Vent 233 2 Lev. 182. 1 Roll. 91 pl. 217. 117. If known it is a act of charity or neighbourly kindness it does not have this effect.

A man took the goods of a stranger and administered upon them. He sold him at the same time supposed them the testators. If he comes sues them as testators it would avoid him. If he claims as owner personally it would be different. so if he accepts & takes a legacy Dyer. 166. 2 Bac. 406. 1 Roll. 917. 1 Mod. 19.

It has been a question whether if an Ex^r begins & then refuses to do the office & the court accepts the refusal and appoints one to adm^r the grant would be good. it seems that it would. 2 Bac. 405.

It may be that the Court did not know of the Ex^r having done these acts but has accepted his refusal. the court may compel him to act. 2 Bac. 405

An Ex^r cannot refuse after once acting. he has once accepted by it. Lord Ray. 443. 165. 2 Bac. 405

Limited Powers of Administrators—

Adm^n must be granted by the court in writing under the seal of the court. 1 Dyer 294. 1 Show 408

Adm^n is to be granted always when the person dies intestate. the Adm^r can do no act pleads with it. for he has the legal title. must have to account. 1 Com 258. 9 Co. 39. Bonds are to be taken of him. & there is no reason why they should not be taken even tho' amount for them is not specified.

Two or more may be appointed & if one dies the power survives & is different in this point of view from any other delegated private authority 1 Com 263. 2 Com. 240. 2 Vern 514. 1 Salk 162. It is in the nature of an office.

There are certain cases in which it was grant'd that Admon could be granted even during the absence of Ex. So when it is a dispute exists who is entitled to Admon or that there is a will such appointed not to suffer the settlement of the estate to be delayed there have all the authority of other Admon pro tempore Lov. 192. Lo. Ray 1071 1 Com 263. 3 Salk 23. Stra 917. 2 Shower 69.

So when Ex. refuses to act Admon must be granted cum testamento so if Ex. dies. So if no Ex. named in the will. 1 Salk 304. 2 Bac. 388. 1 Com. 258 If Ex. commenced & dies an Admon is appointed cum testamento annexo. de bonis non.

It seems that formerly if proft was granted but Ex. died without taking out Execution an Admon de bonis non could not take it out. but I do not see why a scire facias or the surr could not be had by the Admon & then he get surr in his own name This is by statute in Eng made the comm. 2 Bac. 386 Salk 310. 6 Mod. 290. 2 Ray 1072

It is not uncommon to decide disputes thus by stat. — 17th Car. 2.

If made Ex: & commenced a suit but he sold some property for money & took a bond in his own name. B is adm: de bonis. & is entitled to all the property that remains. but he has no property in that note & he can only call on ex & adm: or Ex: to refund. for the property cannot be identified 1 Ch. Ca. 273. 1 Salk. 306 2 Vent. 362

If Ex: is under 17. or if the person who is entitled to adm: is under 21. adm: is to be granted durante minoritate. But these adm: are merely altff and cannot recover like proper Ex: & adm: this is Eng. Law. but in U.S. these adm: have precisely the same power as the adm: this I take to be our law. Eng. judges have shewn disgust at this distinction Hob. 250. 5 Co. 29. 3 P.W. 79.

Where a minor & adult are Ex: there is no need of such adm: If there are two, Ex: one of 17 the other not. no such adm: need be granted because the qualified one may execute the will.

L. Mansfield says that Comm is an antient as any elementary writer & he (Com.) says it appears that an adm: durante minoritate is precisely like other adm: but cannot injure the infant.

It is said that they cannot make a bad or sell goods except they are punishable as a bailiff might. but it is not otherwise.

Where an adm may be repelled & the effects of a repeal are very important, there are some questionable points upon this head which I will omit for the present.

What acts Exr may do before probate.

Exr derives all his auth. from the will & his title vests immediately on the death of testator. it is most desirable to him as real estate to be his & he can do anything that anyother man can do with his own & the only benefit of probate is to enable him to sue for without it he has no evidence of his auth. he must produce a copy of the will & letter of bt. he must have it when he comes to trial. But before he can do any thing release debts sell goods &c.

But an adm can do no valid act until letters granted an Exr may enter peaceable the testators house. may acknowledge Ag against Exr or Dac 4 12. Lov. 172. Co. Lit 292. 1 Salk. 303 1 Com 213 Pr. Cha. 441. 5 Co. 28

The rightful Ownr might recover it again of the debtor
they of the other in an act. for money had & received

Loo. 174
2 Bac. 413

Loo. 174

I suppose he who is entitled to at. should release a debt pay them &c. it is said that if he afterwards gets letters he may recover the debt over again for he had no use the. this I can give not law. all that can be said is if ever he was afterwards appointed he might recover back. but that the course we are might is the most glaring injustice in the world. If one by mistake only could not his own. as soon as the other gets a letter it vests immediately in the buyer.

If an ad. before receiving letters should give away the goods of intestate it would be good if he afterwards took out letters.

If a bond were due from or to a testator his Ex. must pay or discharge the bond. before probate if done before probate & he may be sued if he has done the last act in the world.

The Ex. may sue before probate in all those cases where he could sue in his own right. as when the property is injured or taken away while in his possession. altho it is said that Ex. must prove the will before suit indeed this doctrine only holds in two cases as in suits for debts due to testator in his lifetime or for injury done to the property in testators life time. - Suppose that one which ac-

cuid after the testators death. Ex^r may sue in his own name. Dow. 174. 1 Com. 238. 1 Salk 303 2 Bac. Ab 13. He might distrain for it.

So if he does not sue as Ex^r he need make no proofe of his letters testamentary — Or if he sues for goods sold. it is his own contract. — 5 Co. 29. 932. 3 Lev. 58. 1 Com. 238. 1 Roll 917.

Co Executors

Thus in deed in law one person as in spect the testator their interest is joint & indivisible. the act of one is the act of all. this does not include torts. the possession of one is the poss^n of the other. so is a sale of property belonging of a stable. So if one assigns all his rights whether property he has possession of or reversion. but it does not pass the others. but if it is the property of testator. it passes all is being done officially. Ex^r cannot

have action for each other wrong acts as distrain. 1 Com. 240. Dow. 21. 1 Dyer. 23. Cro Eliz. 347.

The act of one is the act of both. the find that if one has all the reversion the other cannot maintain an actual law to recover half. but the act^n for money had & rec^d was not known at the time this rule was laid down & I should think it would lie.

& I suppose it would lie in Writ of all the formly the rectup was only in Eqt. 1 Com. Dig. 240

Diff is a difference betwn Ex & Adm Our Adm cannot make a valid release they must both join. this appears well established. 1 Com. 240. 1 Salk 460 Lov. 21.

In case of sanity Ex must join. And as to Adm joining in acts there is an exception when the Adm may sue in his own right. as for trespass on property in his own possession. But it is not correct to say that they cannot unite for the possession of one is the poss of both. Adms have been maintained both ways. the poss is ways to entitle him to an 1 Salk 460.

Both in case of Ex and Adm if one dies the power survives to the other 1 Salk 30. 3 Salk 80. Lov 21.

Suppose Ex made mid. many legacies. suppose one has got all the property in his hands. I see no reason why an Adm for money had & rec'd would not lie. if it was money & in not an Adm at law would lie for it. - there is no need of going to Chy.

It is a gen rule that one Ex is not chargable for the wrong of his colleague he is accountable to Adm of effects. not merely what he has personally rec

for the act of one colleague is his act. If the property was wasted by the receiver he only is liable. Chy has interfered to relieve the other until the property is recovered of the other
Cro Eliz 318. 2 Bac. 395. 1 Salk 318.

As all Ex^rs make but one person they are all to be sued but this is to be understood as relating to acting Ex^rs. But in the other hand if Ex^rs sued by C.L. all must be joined tho one has refused. By Con. law the acting Ex^r can sue alone.

By C.L. if the acting Ex^r is afraid of the other wasting the debt he may apply to the Ct. for a summons & severance & then he proceeds alone. 1. Salk. 307. 9 Co. 37.

If both have administered both must be sued. if not the writ will abate when it is pleaded that there is a co. Ex^r who acts as such.—

Suppose one absconds alone. Def^t may abate the writ by pleading that there is another Ex^r whether that other has acted or refused. — 2 Bac. 396. This plea is a plea of abate. you will remark it is only of use in abate. Carth. 51.

The same rule applies to Ex^rs

and Acon. as to bring for trespass 2 Bac. 397. 10 Mod 462.

Executor de son tort.

This Ex. is a person who meddles with the property of dec. exercising acts of ownership over it as if he were Ex. Any unlawful acts of this kind will make a stranger Ex. in his own wrong. — Against many acts of this kind depend for their effects upon the intention with which they are done.

Suppose one takes possession of the property, applies it to his own use paying testators debts &c. — constitutes him Ex. de son tort but to take care of it as a neighbour: does not. Taking a specific legacy, without the consent of rightful Ex. constitute one Ex. in his own wrong. 1 Com 261. Lov. 51. 2 Bl Rep 99. 5 Co. Rep. 33. 4. 2 Bl Rep. 105 1 Dyer 166

Suppose the Wife or any of the family take some property that belongs to them. to her this effect. so if one takes the goods & gives to a third. the third is an Ex. in his own wrong. so if the property was given to the man by the testator to avoid creditors for if he were not liable as one would be. Cro. Eliz 206. 810 2 Bl. Rep. 996. Cro Jac 241. 2 Bl. Rep. 817.

Suppose the gift made on death bed or donatio causa mortis it is liable on insufficiency of assets.

This is according to C.L. the provision of this kind are made in many Statutes by statute.

There have been cases in which such acts as paying Cattle covering the House & even paying debts &c. in short any acts of charity would not constitute an Ex: in his own wrong. Nor if he claimed the property as his own would it be an adverse colour. 1 Com. 264. Lov. 51 2 Bac. 388

The rule then is that if the act done be such as fairly warrants the inference that he claimed the disposal of the effects it is enough. 1 Mod. 166

This Ex: is liable to be sued & the Ad: is as to the Ex: of the last will & testament this there is none. for his acts stop his bringing it.—

These rules do not apply where there is a rightful Ex: or Ad: the wrongful Ex: being accountable to him only the property being assets in his hands. and the wrongful Ex: is chargeable as trustee but as Ex: de son tort.

The cases then in which the Ex. de son tort is liable are when he intermeddles before the rightful Ex: acts & takes possession. & suppose too often, if the property had not been discovered by

5 Ch. 30.
1 Vern. 349
2 Hen. Bl. 23

Relief has been given by Chy in cases of much hardship. - 1 Vern. 147. Plea not to be when heavy demand. -

2 Bac. 390
Eq. Cby. 472

Ex^r or Ad^r 5 Co. 33. 1 Salk. 302. 307. 313. 319. 2 Bac. 388.

Creditor can sue the Ex^r de son tort if this Ex^r has delivered over the property or hand it to the rightful Ex^r his liability to creditors is discharged.

But if he does not he is liable. 2 D. Rep. 99.

When he is sued by creditors he is liable only to amount of assets. & no further by the way he must have paid out according to rank. This Ex^r cannot sue to recover any thing nor can he retain his own debt. So he has all the trouble but no advantage. Sumpson Ex^r or Ad^r sues him. it does not purge the tortfeasance to shew that he has paid all out. it goes however to alleviate damage so as to make them merely nominal. Com. 266.

One who took a bond which constituted him Ex^r he pleaded that he was not Ex^r to another creditor. but it was brot in for the whole debt. this was an old decision & perhaps would now be questioned. Hob. 49. He should have pleaded plene administravit. but however the rightful Ex^r from insufficiency of assets is otherwise liable to loose his own debt. such plea will not avail an Ex^r de son tort. Cowp. 51. 2 Bl. 507. The rightful Ex^r must have no assets in his own hands

2 Bac. 379

1 Mod. 527

Hun cannot be such a person in Cur. as an Ex. de son tort when the estate is insolvent because the whole estate might be thus wasted in the payt. of one debt, which would destroy the effect of the statute. so decided by Supr. Ct. when I was practising. & also in Co. Ct. this 30th Octr. 1817.

In pleas of Exr. must aver not only that he even was Exr. but also that he even administered & consider right now if ce. Laws. Ch. Mr. of Ch. Pryor's cases. Co. Ct.

Wessel thinks that he is liable to creditors as far as he has assets but no further - except where the plaintiff is next of kin who is liable further Hob 69: He is liable to rightful Ex^rs for the whole as a man, & may the property of matters vesting it Lov. 51. Cro Eliz 104. He is also liable to legatees, Hob. 43.

Either Ex^rs may retain for their own debts in preference to all others. if equal degree Ex^r de son tort cannot.

It is said that if there are two rightful & wrongful Ex^rs you may join them in a suit. because the public cannot know true from false Ex^rs But an Ad^r cannot be thus joined with Ex^r de son tort.

A was Ex^r de son tort. he administered & died after appointing Ex^rs it was determined that his Ex^rs was not liable as Ex^rs in his own wrong. 1 Com. 266. There is a statute now making him liable. but if the principle of Ex. is right we must always go to Ch^y 2 Rhod. 293. Lov. 51, for we have no such statute

Making Debtor Executors.

It was once understood that if a man make a debtor his Ex^r it discharged the debt because he could not recover it out of his own hands, but could not sue himself but an Ad^r was not thus discharged. And it is now holden to be assets in hands of both.
1 Bro. P.C. 179

If a debtor is made Ex^r it is an absolute discharge of the debt within the Act as no provision can be sufficient assets to pay testators debts. So if one of several joint debtors is made Ex^r it discharges the debt. So if the wife of a debtor is made Ex^x 2 Bl. 512. Wms. Off. Ex^r 31. 2. 207. Lov. 158

The rule as to bequeathing to creditors appears to be that if the legacy be equal or greater than the debt it shall be deemed a satisfaction, but Ct^s have anxiously searched for circumstances to weaken this rule which is that strict. such as mention in the will of pay^t of debts. so when the legacy was not equally beneficial with the debt. in order to give creditor both. Lov. 155 note. 1 P.W^s. 410. & note. 3 Atk. 65.

Both for debts & legacies. — If there will after a debt without he could retain. — On the old reason. but it is not allowed to be retained if he had. allegacy in the will this has not been decided but there is no doubt as to this point. Yelv. 166. 1 Salk 303 — N. idea in Eng was that the Ex: was of course a residuary legatee. but Ch J supposes in. & made him a trustee in certain cases — as when he has a legacy. —

Marking Creditors Executors.

It is of this advantage to Cred: that he may retain his own debt before all others of equal degree. 2 Bac 375. 1 Salk 304. 10 Mod 296.

An Ex: may do just so he may retain. these rules are very reasonable where there is priority of rank in debts.

Ex: right to the surplus. It had been long settled that after all debts & legacies paid Ex: had the residuum. but Ch J considers him as trustee for those entitled to the property under the stat of distributions if he had a legacy. this affording proof of intention. that testator intended him to have no more. Dr Eq no wages are paid to Ex: Lev: 155. 6. 2 Bl. 514. Bro. Ch 201

But here is a question. suppose a residuum of that kind, could Ex: barred

in our States where Ex^rs get day wages. It is a question to make a figure at our bar. Ch^y in such case does not give it to him if he otherwise paid for his trouble.

But if it can be proved that testator intended the Ex^r should have the residuum by parol com: the Ex^r will have it. this parol is to abut an Eq^y. 2 Vez. Jun^r. 465. 1 Vern 473 3 P. Wms 43 _ 2 Atk. 27 3 Atk. 226. 300.

In the case above in Vez Jun^r the Ex^r is to have it unless the presumption is violent against him; a legacy of consequence affords great presumption.

Parol proof is always admissible to rebut an Eq^y tho there is a written inst. 2 Atk 68. 272 3 Ch Wms 40. 2 Vez. 91. 1 Wils 313. 1 Bro Ch^y 201. 228. Talb Ca. 240.

Wills.—

A will is a dec^n of a mans mind in word or writing with respect to his estate to take place after his death any dec^n as to real prop. by word is good for nothing By Ch. a nuncupative will was good of personal property but by statute in Eng. it is good only in certain case. This makes a great question in U.S. Our Ct. said that customs made it necessary to write wills & that made it law. so we can have no parol wills. in some states it is made necessary

It is not sufficient that the blind man acknowledge the will without hearing it read. One witness who was the writer was however held sufficient to prove the reading. Lov. 141. 2. 4 Burn. Ecc. 44. 55

A Feme covert cannot dispose of real property at all by stat 43 Eliz. c. 8. By consent of her husband however she can dispose of personal property and without his consent it is said she may make a will of her savings out of her pin-money this not being within the husband's control nor subject to his debts. Lov. 144. 4 Co. 60. 4 Burn. Ec. 47. 49 2 Bl. 499.

to be in writing by stat & I suspect a parol will is not good in U.S. being founded in custom. Carth. 38

Who can make wills. The presumption is always that a testator could make a will. & the onus that he could not, lies on the one who oppose the will. But idiots, lunaticks, or those delirious in sickness, or infirmities of age, want of discretion being in all, cannot make a will. So a man may be ignorant or blind & if the reading was not correct or was, the reading was not proved the will is not good. — A will made in a fit of intoxication will be set aside if not a reasonable will. The gen.l proposition is that a drunken man can make no will.

An alien enemy can make no will. — & bills made under any restraint or importunity or fear or to get rid of tracing in sickness &c.: testator from will will be set aside. So if one yields to his friends who be cavilled after importunity. but if the testator gets well & lives long after the will is not to be set aside. — it being only void by the events & no very scrupulous or strict point — wishing testator to be perfectly a free agent — It is not necessary there should be fraud or absolute deceit.

It must be his own free unbiassed will.

When can a person make a will of his real property? he cannot of real estate 21. It is said he can at 14 if a male: if female at 12. in the places it is fixed at 15 for both sexes and again at 17.

There are reasons why 17 should be the age to make wills. D. Blackstone says the age by law is the same as of the civil law. we find that by civil law 12. 15 were the age for certain purposes but not a word by which we could learn that was the age for making wills. But by civil law the age for majority is fixed at 17. D. Cowper explicitly declares that 17 is the age for making wills of personal property. So the consent of mankind is in favour of 17.

There are certain circumstances under which property cannot be willed away by the person who is the apparent owner. as the notes bonds &c choses belonging to feme covert. a separate property owned by the husband he cannot will the same away. So her paraphernalia. tho he can dispose of them in his life time he cannot will them away. & if he pledges them his estate must redeem them. & if he disposes in his life time of her choses he dying &c she can recover it.

Co Litt. 20: Note 8.
1 Tr. 2.

2 Bl. 395
2 Bw. 279

But if money of intestate can not be with the property immediately in the first taker from policy of law as there is no method of having such entailments, Ld Loughs says the indulgence was shewn only when the use of goods & not the goods themselves were given to one for life & remainder over first entailed But this distinction is now disregarded & if a man by deed or will gives or devises his books or furniture to A for life with remainder over to B it is good Then follows the case in text Inventory see of goods (page) Lovelap. 135

By C.L. an estate for life with remainder could not be granted out of an estate for years this is founded on a whim. But it may be done by way of Cy: devise 2 Bro Ch. 33 127 Co Litt. 20. Not so as create a perpetuity 2 Bl. 173. This rule applies to all kinds of property (personal) 2 Bl. 398 You may give personal property or rather the use of it to one for life with remainder over as in a library of books. — If it perishes in the using there is nothing left & the tenant is not accountable. — A case was stated in Chancery where a testator gave an old grandmother the use of so much money, the court held as the interest would not support her that she could use the principle. —

It is sometimes said that the life tenant must lodge an inventory of the property with the court & give bonds to answer for the remainder but it is now determined that he need not give bonds altho he should lodge an inventory

It is said that you can not create an entailment in personal property But I do not see why the legatee & his son in tail would not take an estate tail for life, if the property were given to him & the heirs of his body. There is no reason that it should not absolutely in the first taker. — Whenever personal property is held in joint tenancy it cannot be severed. But I take it that joint tenancy is abolished at least the great accessory is. Our statute says "all the property to

State it however that he can devise any estate — joint tenancy altho it is not so in Eng.

A Will of personal does not require the same ceremonies as of real property. it need not be witnessed if it could be proved. So it need not be subscribed. if it is written in testator's hand it is enough. as When the will begins I. J. Doe. Thus in a case in Lovelace where the signature was by another by testator's direction & it was his grant. — So if he cannot write, his mark to his name written by another is enough. 2 Bl. 501.

There is a question of magistrate more made discussion. The rule as laid down is that a will of personal & real property, if good to pass the former is void only as to the real. The argt is that you are to carry into effect the intention as far as possible but this is a very fallacious argument for it is most probably that the intention is to be gathered from the whole & not from a part. — The case would be stronger in Eng. than here. But there are cases in which it would operate very hard in U.S. — The rule to govern in all cases is the intention of the testator.

Duty of Ex^r & Adm^r

The first duty of both is to make out an inventory of all personal property and then to procure an appraisal by judicious persons under oath. The Ex^r & Adm^r is then to account with the Court for this property. not however at the appraisal. but for as much as possible it can be sold for it has been said that Ex^r may turn off valuables at the appraisal but it is not so. If a legatee will take at appraisement it is very well. If a loss occurs from negligence &c the Ex^r is liable in some way. When however he is sued as Ex^r for debts he is accountable only for assets.

It has been a question whether a judge of Probat ought not to reject a piece of property out of the inventory which he thinks does not belong to testator. He has it he ought not to. for it does no hurt in & if rejected it might happen after.

It is not only rule that Ex^r is liable only to extent of assets but he is not answerable for them until he has received them unless there has been some unwarrantable delay. judg^t given against him that Ex^r is always entitled to Lev. 22. 1 Ch. Ca.

If Ex. submit to arbitrament he does it at his own hazard. for the award is no defence to him unless he shows that account was right. 7. P. Rep. 453 5 P. Rep. 61. 671.

The liability of Ex. upon principle may vary every day. as by continually paying out & receiving assets.

It was long questioned whether the prog. of Ex. would be chargeable with interest, in setting accounts with testators debtors. they should make a mistake. but it is now settled it would seem 2 H. Bl. 618. 1 Ham Bl. 102. 8. Ves. if they owe them but they ought not to be liable.

After inventory and appraisal. debts are to be paid which is the next duty. No legacy is to be paid until all the debts paid. by C.L. funeral charges first. expenses of proving will next. then debts of record or specialty due to the king — then debts by statute as those contracted during last sickness. this is made so by statute in most states. Next in prog. debts. debts of record. then specialty debts evidenced by deed & seal. & then simple contract creditors. if any thing remains it is to be distributed according to law to next of kin or legatees. 3 P. W. 402 Talb 277. 2 Vern 521. — If he should pay out of this order he is liable out of his own pocket. —

An inferior debt due before the bonds can be paid the loan cannot be paid first

This proof you procure is not equitable for so many bonds debts are not paid.

Suppose all paid but two bonds that is all of higher rank. there if not enough to pay both. Ex^r may pay which he pleases if both are due.

Suppose Ex^r or Adm^r has paid out all apply to debts of lower rank he is personally liable except he was ignorant of the existence of the bond debts Ex^r often files a bill in Chy to enable him to pay legacies 3 Lev. 57. Cro Eliz 315. 2 Bac. 434. 5. 1 T. Rep. 690. 2 Show. 492. he not knowing of debts this means him.

When it is said that he may pay which he pleases it is supposed that no suit is brot for if one get Ex^r he must be sued first. 2 Dan Pl. 413.

It is questionable whether Ex^r is bound to notice debts of record ex officio it would be unreasonable that Ex^r should be thus bound. judgs in one state are as good as in another the might be forced to run from Geo. to Maine. he ought to have notice. A bond made voluntary, without consideration is to be postponed to simple contract creditors but is preferred to all other voluntaries. this latter part of the rule is somewhat questionable. But how is known to be a voluntary bond if it is disputed, the Ex^r calls in Creditors & obliges them to fight it out

in Chy by bill & then he has no further concern with it. 1 Eeth. 292. Law. 56. The Ex is not bound to judge of the consideration & would be liable somemay or other if he taken upon him to judge when informed of the circumstances. The consideration can be inquired into when third persons are concerned.

It may be that Ex himself has become a bankrupt having retained assets to pay debts not yet due. the question is who loses. he has paid the legatees. thereby is that Creds may follow assets into whosesoever hands they go. The double creditor can follow the assets into volunteers hands when no assets are retained to pay debts.

There is no law in England to restitution of debts.

Payment of Legacies

The next duty is to pay legacies which relates only to Ex. A legacy is a gift by will of personal property.

If Ex has a legacy he has no right to prefer himself as in case of debts. 1 Vern 434 — you will remember that the legal property of this legacy vests in Ex for the use of the legatee to whom he appoints the legal title is

vests in legatee Co. Litt. 111 2 Salk 598 as to the land the equitable bfn

If there are specialty debts the specific legacies are to be paid first & pecuniary if no specialty debts are to be paid

Specific legacies are any gift that can be identified as horses &c stock &c Money in a bag But pecuniary legacies consist of pounds shillings & pence.

Suppose nothing left after debts paid but specific legacies & further Exr is obliged to take one of those to pay the debts, is the legatee of that to loose the whole? It is generally true that if the legacy had been otherwise lost as a horse killed with lightning the legatee must loose it. I shall speak of this question hereafter.

After specific legacies are all paid & there is not enough to pay pecuniary legacies in full he must abate 1 Vern 31. 2 Vern 688. 1 P. Wms 422. 2 Salk 415 3 Atk 96. 1 Bro Chy 60.

The Exr is not to intermix with specific legacies until he has exhausted all the other property bequeathed. He may finally resort to them & take which he pleases. as to this subject there are contradictory opinions. I take the current of authorities to be that the other specific legatees are to contribute. Roper on Wills 113

Debts being all paid from the pecuniary legacies as to
incumbrances
some surplus. if there not enough to pay all
each takes a proportional share. 1 P.W. 222. 495.

If Ex^r takes a specific
legacy needlessly when there is enough besides to pay debts
he must make up the amount of it to the leg
atee. — 1 Bro. Cha. 160.

When are a set of cases in which
the pecuniary are preferr to the specific legacies.
Suppose a man gives all his estate away in specif
ic legacies & then dies & much to be paid out
of the estate as pecuniary legacy. so contain
ment one of a specialty of property at a cer
tain place. it operates as a charge or
condition upon the legacy. 2 Ves. Cha. 393.

Of lapsed & Vested legacies

a vested legacy is one the right to which
vests immediately in legatee or his representa
tives. as testator dies

If the legatee dies before the testator the legacy is
lapsed & it goes into the residuum. 2 Ves. & B. 246
Loo. 206. 2 Vern 207. 378. 521. 916. Pre Ch. 201.

I observe
that some states have altered the laws in this respect
& given the legacy to the representatives but it is
lapsed without such stat. these statutes are taken and
so this distinction seems to be increasing

There has been a decision in England that it was not the intention of testator that it should lapse but the current of authority is against it. 2 Vern 394.

A legacy may be given upon condition if that fail there is no pretence but it lapses. that condition must be a reasonable one.

A legacy is given to A payable at a future day that is a vested legacy. debitum in presenti solvendum in futuro. it is a vested legacy.

But there is a distinction more nice than wise. If it is a legacy payable to a man at 21 it is vested. but if it is given to him at 21 & he dies before; it is a lapsed legacy. — This cannot be founded in intention for if the testator intended so he would have said it. This rule was founded by the ecclesiastical courts & they have supported themselves by it. but have shewn disgust at & avoided it on slender pretences.
1 Vez. 542. 217. 2 P.Wms 610. 3 Bro Cha. 471 1 Vern 462 2 Vern. 675. Pre Cha. 21. 2 Eq Ca. Abg 295. Stra. 820.

This a rule has obtained in favour of the heir that the legacies are lapsed on both cases if charged upon real estate. This however would not hold with us for we do not there favour the heir

Further they distinguish between real & personal property with us however both are alike. & thus the rule cannot apply. 2 P. W. 610

As to the rule,

let the words be as they will. if the legacy is put upon interest it is a vested legacy for the presumption is violent that testator intended a present interest. 2 Vern 673. 1 Vern 462. 2 Bro Cha 305 375. Pre Cha 37. 1 Eq Ca Ab 512. 3 Eq Ca Ab 625. 2 Vez 263

Whether put upon interest or not if payable out of a fund which yields an annual increase it is a vested legacy. to arise. This is wholly void by Chy to evade the general rule with which they were disgusted.

The same rule in favour of the heir has been extended to devises of land. 1 Eq Ca Ab 522. 2 P. W. 276

It is said that the representative of a legatee may claim and the legacy immediately on testator's death. it only means that if it is alive he may.

Conditional Legacies - Pre Cha 470. 2 Vern. 207. 521. 611. These are not vested or as if the legatee lives &c. 2 P. Wms 612. note 1. 4 Ed

If the condition is unreasonable

The condition only is void.

2 Vern 91

1 Vern 20
2 Mod. 84
Gwd. 26

the legacy must. Most cases in the books refer to marriages. There was a case where the legatee was the heir at law who was not to have the legacy if he disputed the will. the court held the condition was unreasonable & of course void.

A condition that legatee never marries, is void. as are all general conditions not to marry a person of a particular class. 1 Mod. 86 1 Vern 20. 1 Rom. 244. 252. Ster. 214 There are exceptions, in public policy.

A husband may restrain his widow from marrying when he has children but this condition would be binding for he has an interest in the education of his children. If he has no children the condition would be void.

Restrictions of marriage before a certain age is good. this however is to be left to the court. the age is not settled. it might extend in a female to 18. but by presumption not be yond.

There is a case of restriction of not marrying in a particular place & it was held good it is however be a whimsical thing. 1 Ld. Ray. 285 1 Rom. 244. Swin. 267. 1 Vern 20

Doulas says if the condition be not to marry a particular person, or a widow or one of any particular place, it is to be performed. pl. p. 160. Gobs. 25

1 Vent. 199
1 Lev. 302
Pre Ch. 565

16) Yet there is a distinction between the legacy charged on real estate & one not for here if there is no devise over yet legatee shall loose the reason is real estate is governed by Ch. personal by the Eccl. law
Show. 160. Cha. Ca. 22. 1 Vern. 20. 1 Will. 21. 3 Lev. 330. Bro Cha. 303

2 Vern 166
2 Vez. 206

There is much more reason in restraining from marrying a particular person as a vagabond than on account of religion. as being a papist.

When the legacy is given under condition not to marry without consent of a particular person, the condition is void being only in terrorem. unless the legacy is given over. This law is of no use nowadays when the parties know nothing of it: or rather condition (61)

When is a legacy well given?—

Intention is the pole star. technical import is not regarded at all. any words that can be understood answers. — As where the testator gave to his children & had only grand children. if he had children at the time of making the will the grand children would not have taken. —

If a man leaving a sum of money to be divided between his children the authority says none are meant except those in esse at the time of the execution of the will. — There are other cases where it is said directly that all the children which he has at the time of his death would take. I take it however that if the testator gave to his children all would take. but if it were given by a stranger to the children of J.S. those only would take who were alive at the execution. & I think the authority warrant this Ayer 174 Co Lit. 11 2 note. Pre Cha. 470

Property was given to be divided among the testators "relations" "poor relations" "relations of good character" the Ct considered the discription too general to hold. & directed the estate to be distributed according to the statute. P. Cha. 401. Pal. Ca. 251. 2 Vy. 527. 2 Vent. 381.

When property has been given to be divided at the discretion of a particular person among children. the Ct. hold the legacy good. but would not let the trustee abuse their trust and will restrain him from unreasonable distributions. 2 Vern & 21. 513. God. 272. 3 Bac.

Godolphin lays down a rule. that if a testator makes use of words in the present or future tense; they show the intention. but if it is doubtful the future is presumed.

A will, in words sufficiently comprehensive passes all the estate of which testator dies possessed. 1 Salk 237. 2 Vy. 238. - secus with. 1 and for it is easy to ascertain what testator owned at the time - not so with personal.-

Suppose I.S. gives all the personal property he owns at a particular place it is said that it includes all to be found there. let him die where he will. I conclude he contemplated all that could be identified. this however has been considerably disputed.

The bequest of a particular article at a particular place is good whether it is there or not at the time of testators death. —

A century & one half ago a rule was established in Chy that if a legacy were equal or superior to the debt previously due to legatee, was given to a debtor & he took it that it was in satisfaction of the debt. On the ground of intention. This rule however was soon opposed but instead of rejecting the rule they laid hold of circumstances to evade it, in fact however the rule was abandoned. It would not appear to a common man that it was intended for pay.t it is called a legacy by testator.

The first class of cases in which the rule was evaded was where the debt was money & the legacy entirely different sum. so that the rule was more than that the legacy must be also of same genus. 1 P.Wms 141. 3 P Wms 226 note Pa Cha. 138 394. 2 P Wms 616 1 Veg. 521. 263

Another class of cases not within the rule is where the debt & legacy are not payable at the same time. so the legacy must be payable at least as soon as the debt. 3 Atk 96. 2 Veg 400. 636. Pa cha. 236. 2 P. Wms 616 1 Veg 521 2 Veg. 209. 3 P. Wms 22. Atk 300. 96. Another set of cases was when the will said "after payt of my debts" "I give &c." 1 P.Wms 410. Roper 168. both sum & debt to be paid

Two legacies of £1000 each Stock Annuities were given bearing date and by the same person in the same instrument it was held testator intended legatee to have but one. Bro Cha. 30. But when the same sum was given in two instruments a will & codicil it was inferred that testator intended legatee to have both. Bro. Cha 2 P. p. 387. 393. From these & other determinations it is said that when two legacies of an annuity are given simpliciter to the same person by the same instrument the presumption shall be against their being intended as accumulative: otherwise when given by different instruments. But when both legacies are certain for the same cause they shall not be cumulative whether in the same or different instruments. otherwise when one is given generally & the other for a special cause and that very slight circumstances have been considered sufficient to show the testators intention either one way or the other

1 P.W. 424. 1 Atk. 1. Lee. 205. 2 Atk. 340 1 Bro Cha. 425

at same time of a legacy of quindecim quindecim and also payable at the same time. & no such clause in the will. - The court said that the legatee being illegitimate. testator was bound to provide for him. This shews the anxiety to evade the rule. For there was no other reason of reading it. -
1 Bro. Cha. 129. 295.

During this mid some of the judges held that something ought to appear in the will which should shew the intention of testator that to pay the debt. See Cha. 240. 2 P.Wms. 555.

After this a case arose of a legacy quindecim generis payable at the same time. no clause of pay.t of debt in the will. the legatee not illegitimate nor any thing to shew the testators intention. The court held that the intention of testator to apply the legacy to the debt must be explicit. So I take the rule to be that if the legacy is not expressed to be in satisfaction of the debt. the creditor & legatee are to have both. -

Repeated Legacies. -

When the same legacy quindecim quindecim and of the same quantity in totidem verbis. in the same instrument. it is considered as a repetition

If however given in distinct instruments both & all

so of the legacies are of different shares of property & the in the same instrument— (See notes to last page)

will made. These rules go on the grounds of intention as by a codicil or bond bro' before the will. 1 Bro. 389. Where the doctrine of cumulation & repeated legacies are explained. 2 Atk Bl. 213. Swin. 526.

There are a set of cases in which a will is said to execute a contract as in case of marriage settlement. which not having been executed the will is construed to be that performance. A husband gave a note of £3000 to his wife which tho void in Law was held good in Chy as the execution of a marriage settlement. Pr Cha. 263. Seemeth the testator gives the amt of the legacy in his life time for double portion the Courts lean against. P. Cha. 163.

1 Vern 95. 2 Vern 115. 555 340. 1 P Wms 224 1 Bro Cha. 305. 3 Vez. Jun 53.

Again there are another set of cases where the same thing provided to be done by the will is done in the life time of testator These are considered as satisfactions pro tanto of the provision in the will. This goes on presumed intention of testator. Pr. Cha. 263. & acc. 1 Vern. 95 & Pr. Cha. 263.

Ademption of Legacies

We will only affect as to avoid the particular legacy by destroying testr right.

An accidental destruction or alienation of the

In July 86 Lord Thurlow determined the principal of a void devise of this amounting to £35000 to be a specific legacy notwithstanding the sum was named & to be discharged out & wholly by testator having received part of it in his life time. as a diminution under the bankruptcy of the obligor. 2 Bro. Cha. 108.

" notwithstanding in a subsequent codicil testator ratified & confirmed" Swinb. Lor. 167 Prod & Admt. 2 Fonblanque Eq. 224.

legacy may or may not be an ademption of the legacy.

Suppose a bond ag^t. A. is bequeathed by T. N. to A. B. afterwards A. sues it up. - you cannot account for taking away the legacy saith on the ground that T. N. intended to make the legacy it would be an ademption. For if the testator collects it by law without any harsh necessity it is an ademption that he is obliged to accept pay when offered. -

If a ship is burnt down & the testator puts up another in the same place. the legacy is good.

These question as to ademptions are sometimes very nice. 3 Bac 470. Lov. 205. 2 Vern 631. 681. 2 Bro. Cha. 608 2 Vent. 681. 1 Eq ca ab 302. Roper. 39.

So it is laid down that if the particular thing is bridged or sold, if a matter of necessity it is not an ademption. 1 Mod 373. 2 P W^ms 328. 164. Amb 401. 2 Vez. Jun^r 359. Rop. 35. 2 Vez. 625.

When a man gave his daughter a legacy will and afterwards gives it to her as a marriage portion it was considered as an ademption.

When there is a bequest of property at a particular place it is a great question whether the goods must be there

at the time of testators death to give effect to the legacy. The authorities are contradictory. directly the testator could not certainly refer to the property three ten years after. It seems to me that you must consider it as an entire assumption of the legacy. or so as to give legatee the value of property then at the time of the execution of the will. This latter method appears to me the correct one. for this is the rule as to bonds &c or specific legacies.—

Case was Testator devised all the property he had in a certain ship bound homeward laden. the ship arrived & the goods were taken out before testators death the Ct gave the value of the goods. Rep 39. 1 Vey 273. This follows intention precisely. for if only that was to be taken which was in the ship at the time of testators death the legatee would take nothing.

Abating & Refunding Legacies—

An Ex is never obliged to pay any legacy untill legatee gives security to refund if debts should afterwards appear for there are no stat of limitations in Eng as to Exhibit debts ag[t] testator. 2 Ch. 255. 2 Vern. 205. And it is said that if this security is not given & estate is not compl[t] able to afford

It is laid down that if Exr should pay a legacy without such security the legatee cannot be compelled to refund but the case does not warrant this. all it means is that Exr cannot compel legatee to give bond. if he does not he has no right to the legacy — for if a legacy were thus paid on the supposition that there were no debts remaining unpaid. it certainly ought to be recovered in an act. of money had and rec. as paid by mistake. 1 Vern 94. 160. 2 Vern. 205 Cha. Ca. 145. 2 Vent. 360. 2 Vez. 193. Cowp. 19. 210.

It is a rule that a creditor may come upon the assets of his debtor in the hands of a legatee by a bill in Chy. in case the Executor is insolvent but not otherwise. But why not without? the only reason is that he has his remedy at law ag.t Exr. In any case then when the creditor cannot get the money out of Exr he may come upon the legatee. for cred. is entitled to the money legatee is not.

Suppose that for any reason the money cannot be recovered of Exr as where he has paid a legacy under a decree of a court of Chy. or any other reason he may go to legatees for in the case instanced there is no effectual remedy ag.t Executor

2 Vern. 434

Eq^r not intending wrong must state he accountable out of his own pocket

It is said but may sue Ex^r & then Ex^r sue legatee but Cred^r cannot recover of Ex^r nor the Ex^r of legatee for the legacy was paid under a decree of Ch. 2 Vez. 193. 1 Vern 92. 2 Vern. 205. 2 Vent. 358.

It has been determined that a legacy pecuniary to Ex^r must abate as well as the rest & all pecuniary legatees abate in proportion. Ex^r a mile as others 1 Vern 31. Cro. Eliz 467.

Suppose all debts paid and all pecuniary legacies but one & there is a deficiency. this legatee has an act^n ag^t Ex^r who has made no provision of refunding. — It is a correct principle that one pecuniary legatee is as much entitled as another & suppose in this case Ex^r insolvent so that remedy against him would be ineffectual. & there is no hardship to refund. the only possible way to preserve the law entire is to entitle this legatee to come upon the other pecuniary legatees & the case would be still stronger if the former legacies had been paid under a decree. Cha. Ca. 136. 2 Ch. 28. 2 Vent. 360

Ex^r must see debts paid first & seems that if the legatees have got the assets it must come out of them. —

It may however by a length of time that raises a presumption of payment, -

Payment of Legacies.

When the legatee is an adult it is to be paid to him.

A legacy is not barred by statute of limitation. (b)

Cases arise when the legatees are minors when such have guardians appointed by law not such a father. It is safe to pay to them but if the father is living. Ex. is not to pay to him for a father gives no bond he may apply to the court & get an order to pay to the father. if he does not get such order he may be liable to pay it again. There was a hard case of paying to the father of a very large legacy in London & Ex. was obliged to pay it over again. 1 P. W. 285. 5 Co. 29. 18. Eq. Ca. Ab. 300.

If a legacy is given to the wife it is to be paid to her husband unless it is given for her separate use (when it is not to be paid to the husband. 2 P. W. 213. 2 Ch. Ca. 214.) There is a case where a wife gave a rec. for the legacy which was not given for her separate use & Ex. had to pay it over the wife was living separate. The rule is that a husband is entitled to all legacies left to the wife & can sue for

This time is often prolonged.

When a legacy is given charged on lands or money in the funds which yield an immediate profit & there is no day of payt mentioned the legacy shall carry interest from testators death. So even where it is charged on personal estate which cannot be immediately got in. Ld. Cowp. 290. 2 P. Wms 267.

for them without joining with the wife. And this case depends upon the articles of agreement by which they had agreed to live separate 2 Vern 261. Rep. 96. the living stand pending to their extent.

So when husband & wife are divorced a mensa et thoro the husband has still the same title. if the divorce had been a vinculo the alone would have had the title. 12 Mod. 391 2 Vern 659. Cro Eliz 98. 910. Mom 655.

Where are legacies to be paid?

If testator has appointed the time it must be paid then if not then appointed. the legal time is one year being the time for settlement of estates. 2 Salk 415 2 Bro Cha 39. 1 P Wms 696. 2 ib 88.

If legatee dies before time of pay^t it must be paid to his representatives at the same time it must have been paid to him 2 Vern 31. 199. 283

When the legacy is to be paid the gen^l rule is that it is to carry interest from the end of the first year if the time is necessarily prolonged. Then int is cast from that time.

If however legatee is an adult & he does not make a demand within reasonable time Int. is only to be paid from the demand. Here you perceive a difference from cases which carry interest from the time they become due. Pef. 104. whether demanded or not.

This rule does not apply to minors for they have interest without demand from the time the legacy became due. Pr. Cha. 161. Ca. 209.

It has been a disputable question whether a legacy carried interest from the day of pay^t appointed by testator. whether demanded or not. I think the better authority is that interest is only payable from demand. for legatee is bound to go for it as in other cases of legacies 1 Salk. 415. Pac. Cha. 11. 161.

As to provision made for children there is something different from all this. Suppose legacy given payable to a child at 21. it being a provision made for his support. the courts said the interest was to be paid from time of the first year & 6d^y might & two courts would go still further & say the interest should be paid annually 1 Eq. Ca. ab. 301. 2 Atk 329. 3 Atk 101.

Recovery of Legacies

Legacies are to be recovered according to the laws of each state. In Eng. a bill is filed in Cor. & only then I believe, they are recoverable before C.L. courts.

Probate courts are gen^l. to be applied to & I suppose Sts. of Equity would have concurrent jurisdiction on the ground of conscious Ex^r being trustee 2 Show. 53

There are cases in which legacies are recoverable every where in the C.L. courts as where a legacy is charged personally upon a legatee or devisee. If upon land. whoever has the land is answerable. who is the tenre tenant. Pr. Reg. 937 5 T. Rep. 690 7 T. Rep 66. 1 Atk. Ch 108. 1 Mod. 143.

Residuary Legatees.

Whenever a residuary legatee is appointed he takes the residue to the exclusion of all others. If there is a charged legacy he takes it. but not so if it was charged upon the land in favour of the heir. But we have no such favourite as the heir & the rule does not apply to us. it would be adopting this law

without their reason. the principle originated in feudal customs. of which we should know nothing.

Suppose residuary legatee dies before all debts be paid & it was not known how much the residuum would amount to. the question was whether the residuum went to his representatives. the C. seems & I think correctly that the estate whatever it was, vested in the legatee at the death of testator.
Carth. 52

So if Ex. who was entitled to this died the rule was the same

As the residuary legatee is interested in the estate. he may file a bill for Ex. to discover whether he has not parted with the property unnecessarily or omitted to inventory something 3 Bac. 484. Palm. 409.

Ex. is cut off from the residuum if he has a legacy 1 Vern 473. 1 P. Wms 9. 550. 3 ib. 40 in which case he must distribute according to the statute, the rule however that Ex. shall take the residuum must prevail unless there is an insistable inference to the contrary

Donatio causa mortis

a peculiar testamentary disposition or a present made of some specific thing by a person in contemplation of death. Ex. has nothing to do with it. If donor survives the donee takes nothing.

The legal title vests in the donee & does not require the intervention of Ex. It is good if there are assets enough to pay debts. but if there are not it is void - donee is Ex. de son tort. the donee holds against all other volunteers.

To constitute the gift a good one it must be manual tradition or something equivalent to it. as so many dollars so they can be identified. but not so many pounds &c out of the estate for the article must be identified. it vests immediately liable to be defeated if donor recovers. Pre. Ch. 2 Cg. 1 P Wms. 406. 441. 3 P Wms. 357. 2 Vy. 431. & 439. in the case last cited is the whole law on this subject.—

It has been much questioned whether a chose in action could pass as donatio causa mortis. if it was negotiable there was no doubt - but upon non-negociable it is given how could donee re-

cover pay^t. of it. for no one to whom debt could bring the act^n except Ex^r. so that obligee could not be compelled. The authorities are contradictory & we are driven to principle. Ch^y. we know protects assignments of bonds & would compel the assignor if living to suffer his name to be used. — & why then not compel Ex^r. to suffer the suit to be brot. as in the former case. — For assignee in his own name could never sue. — the equitable title is in him in both cases. and Ch^y will assist him to recover it. So I rule for a chose as much the subject of a donatio as a horse or any other thing. The Ex^r. has nothing but the nominal legal title. 3 P. Wms. 22. 2. 3 Atk. 214.

Actions by & against Executors. —

1st Of actions by Ex^rs.

There are cases where the testator or intestate might sue where Ex^r. or Adm^r. might not & so where Ex^r. & adm^r. might not be sued where testator or intestate might.

Gen^l. rule that Ex^r. or adm^r. are liable for the contracts but not for the torts. but it is

not universal. it was true that at Ch. the Ex^r was not liable for torts.

The rule as it now is. If the tort concerning which the question arises was beneficial to the testator's property the Ex^r would be liable. but if it was not beneficial he would not be liable. You are not to inquire whether the Plff property was injured by the deceased. means act but whether deceased's estate was benefitted.—

By 2 Ed. no action would lie in any of these cases but by stat 4 Ed. 3. it was settled that an act^n would lie for cutting & carrying away timber & the provision was extended by the equity of the statute.—

We should think that an action should lie if Plffs property had been injured 2 Bac. Ab. 439. 445. 1 Com. 241 1 Vent. 31.

It seems then that an action may be brought for a tort. but the action must not sound in tort. it is an action on the case stating the whole facts & then raising an act^n by Ex^r Cowp. 372. 3 T. Rep 349. 4 Mod. 405. 1 Salk 314. 2 Ray. 1, 1. 1502

Stat. of Wm & Mary

at C.L. when a personal act. was brot. by a man & he should die the suit would abate & the Ex. must bring a new action. when the action survived but by a late statute & one which is copied in the statute books that c.l. have seen such actions do not abate if of such a kind as would survive, but if it does not survive it abates. act. of slander &c abate. but of trover &c do not abate because Ex. can continue as well as he could commence another. The Ex. enters his name in the room of testator & getting testators attach & proceeds with the suit.

And if Defr. die Plff gets the cause continued and gets a scire facias to call in Defts Ex. to show cause why judgt. should not be revived.

There is one case omitted by all the statutes which I will mention to you. P.L. brot. an act. ag. D. & after great accumulation of cost it is discovered that P.L. has a good case. P.L. will not sue a scire facias because it is against his interest. and the case of Defts Executor is much the same. Judge had a case of this kind.

If money had been paid the action surviving both for & against the executors

9 Co. 87.
Latch. 168.
2 Ellis. 600. 377.

The only question is whether the executors could have brought the action originally —

There are a few contracts that do not survive

The rule is if the contract is of such a nature that no consideration passes to him from you but the promise comes in consequence of the performance growing out of the act. as when a Sheriff is employed or one to collect a note. a sailor &c. the action does not survive ag^st the Executor of the Sheriff for an escape.—

Ex^r may sue in his own name if the sale goods or property is taken out of his possession.—

Is Ex^r obliged to take advantage of the statute of limitations? the decision are that he is not for it is not to be presumed that testator would not have taken advantage of it.

If Ex^r thinks the demand a just one he may suffer judg^t to go against him. without liability for covenant. 1 Atk 524

Is the Ex^r obliged to avail himself of the statute of usury? the authorities differ— The Ex^r duty requires him to secure all. but I do not think they would say that Ex^r did wrong if after usury struck out he paid the just debt.

It is stated in an

of the body that Ex^r must take very large advantage. I do not think so. if he acts like an honest man it is enough. but I do not think Ex^r justified in forging unions intent. –

When Ex^r sues as Ex^r he is not answerable for costs if he fails by C.L. but is in his own name he is. 5. T. Rep. 234 7. T. Rep. 359. 2 T. Rep. 128. 1 Show. 57. 2 Bro. Par. Ca. 550. So it is advantageous to sue as Ex^r

So if promise is made to Ex^r to pay a debt due to Estate of testator at a certain time he may sue in his own name 7 T. Rep. 487.

2 Bac. 446. You will find the C.L. rule as to costs. by C.L. no costs were allowed in any case but by Stat of Glo. costs were allowed ag^t all except Ex^r & Ad^r who were not included. Our ancestors made a statute making them liable & there is no reason why they should not be made liable. –

An Ex^r is not liable to be arrested by C.L. A question arose whether if you shew what the C.L. is your opponent is not bound to shew the statute that abrogates it. It decided, Stra 682. & 1 Vent. 92 relating to the law of a sister state as the C.L. is prima facie our law generally 6 Mod. 94. 181.

Co Litt 55

Co Litt. 55

What three things are from whence assets arise in the hands of Ex^tr.

The gen^l rule is that personal property goes into Ex^rs hands to be appld to pay all debts. real into the hands of the heir to pay particular debts such as judg^ts specialties Specialty creditors are not oblig^d to go to the heir. & if they do Ch^y must then other creditors to the heir.

There are certain prices of personal property that go to the heir and some ^ apparently real that go the Ex^tr Deer in a park go to the heir but if domesticated go to Ex^tr So fish in a pond. So pigeon in a pigeon house go to the heir

Rent of land seems to be personal property but it goes to the heir that is that which accrues after testators death. it is real property & goes to the heir. if land had been sold the purchase money would go to Ex^tr

Grain growing on the land which by the gen^l rule is real property as it adheres to the land. goes to the Ex^tr as personal property.

a lease for life of another does not go anywhere by C.L. but by stat of Ch^l it goes to the Executor. there are some such statutes in U.S. A Court of equity must be governed by the rule of common law to apply to this case which was good at any C.L. when made

The law as to what was different from what it is now as to fixtures. for all property affixed was real.

But the rule is now reversed. for whatever is affixed to the freehold, (that embarrassed) without materially injuring the freehold is personal property as stone, tools. or instruments for carrying on a trade. -
Stra. 1147. 2 Bac. Ab. 3 Atk. 13.

A term for years is always personal property & goes to the Ex^r & the rent paid for it is personal property. as where testator was lessee & lessee both for years. - & the rent must be assets annually to the inventory Co. Eliz. 712.

Real assets. Suppose S.S. has lands a term for 40 y^rs & dies he devises the reversion this is real assets in the hands of the heir.

Equities of redemption are real property & Chy have made them equitable assets.

Suppose the testator was mortgagee. that mortgage belongs to the Ex^r so far certainly as he gets the money & mortgagor must pay the redemption money to the Ex^r. If mortgage is foreclosed the heir cannot have the land without paying the debt & Ex^r may sell it to raise assets

1 Roule. 78
5 Co. 29
Coutt. 426
1 Salk. 29
Burr. 1802
Co Litt. 72. 31.

(D) Thod doubtful if it does not Amount to Expiring a Power of this Debt — a Legacy is not a forfeiture but [illegible] has only Power —

it is personal property. The hire has only the nominal title. 1 Vern 421.

The first kind of paraphernalia are the cloathes & bedding of the widow these are never liable. But the second class of jewels &c are liable only however on deficiency of assets to pay debts.

Admrs Bonds.

Every man when appointed Admr gives bond faithfully to do his duty. Exr is never bound wh there is danger when they execute them. 2 Bac. 379. Carth. 257. 1 Show. 296.

It is said that an infant cannot give bond & so cannot be Admr. tho we find no difficulty when we require Exr to give bond. for if of age to give bond Exr he is so enough to give bond and the bond holds. and the case is an exception to the C. L. rule.

The bond is conditioned to faithfully administer now payt of a debt is no breach & it is sometimes laid down that a suggavit is no forfeiture. But it would be when there is a midway legatee. So if he does not distribute. go to the court & complain it is however no forfeiture If he does not inventory correctly or make

a false account to the Ct. it is a forfeiture. the bond is taken in the name of the court & the recovery is in his name. & he is obliged to let an injured party have the bond upon security given not to make cost for the judge.

Devastavit.

Devastavit is any negligence or misconduct in the Ex[r] or Adm[r] whereby any injured party is damnified & much more if there is any fraud & the judg[t] is against his private property. Allowance is made for misjudging but not for negligence.

The Remedy. If Ex[r] does not pay the debts as he ought to, you bring a suit ag[t] him as Ex[r] & you prevail. judg[t] is rendered ag[t] the property of testator in his hands. If Ex[r] pays or turns out property all is well or you may levy upon property when you find it. but now if these things happen & Sheff returns that no property is to be found & Ex[r] will not pay. You then get a scire facias on this judg[t] & you get an Ex[n] ag[t] him de bonis propriis. (it is evidence to the jury) Here he can not plead plene administravit or any other defence and now he can plead nothing that he could have plead before. it must be something that has happened since. If he had

plead no plea in the first case judg^t is rendred ag^t
upon grands accidents. & here will be no room
for a scire facias unlesse after do come. —
& there is no defence against a scire facias un-
lesse the statute has been since paid. —
Remedy for devastavit. — Tho both Ex^rs
are liable to these suits yet only one Ex^r is li-
able for devastavit he who committs it.
The common form is: to bring an action
ag^t Ex^rs in common form & he pleads plene
adm^t & Ex^rs prevail still judg^t is rendred
ag^t the estate which does Ex^rs no hurt if he
is not to blame. but no scire facias can
issue except on the footing of a devastavit.
The Ex^rs is issued & the Pl^ff returns a dev
astavit tho it is not necessary he has by
only returns no goods then a scire facias
issues suggesting the devastavits. Ex^rs denies the
devastavit & then it goes to trial. & if they
is found to be one judg^t goes de bonis testatis
Cro. Car. 527. Cro Eliz. 855. 1 Dyer. 210. 5 Co. 32.

There is a practice of this kind in some states viz.
Def^t pleads plene adm^t & Pl^ff replies devastavit
allowing Def^t plea but founds his plea on tick
upon the waste. this appears to me the best mode
of pleading in the world.

Power of repealing an Adm. when granted.
It was formerly held that a judge could not repeal but that is not law now. 1 Com. 263. 1 Vent. 683 Cro. Ch.r 45.

If Adm. had been obtained by fraud or mistake as on the ground that there was no will or it would be revoked: or where it has been granted to one not legally entitled. This is a matter of discretion with the court as where it had been granted unintentionally
Lov. 18 47. 2 Bac 210. 1 Com. 263. 1 Salk 38. 3 Cro 56. 1 Vent. 128.

In these cases you will see cases of grant upon false suggestion surprise &c. or when the will was not the last one. 1 Lid. 293. 3 Mod. Eccl. 911. 1 Com. 263. or a will discovered after Adm. may be revoked sometimes from things that happened afterwards as Adm. becoming a lunatick. 4 Burn Ec. Law 236 have but valuable book Lo Ex. when the estate should have been settled might have been a lunatick & Adm. granted afterwards he recovers the Adm. might be revoked It is said that an appointment of a second where the first was. I do not see how. Cro Eliz. 460. Lov. 19. 2 Ray 684

6 Co. 18.
Lov. 50

(d) But it was void against creditors and the dome or Ld ~~[illegible]~~ in
Evt in his own wrong.

The consequences of repealing an Adm^n

On this subject there are collateral questions not yet settled. If the obj^n to the adm^n is that it is granted to a wrong person & after the Eccl^s Court has proceeded on appl^n the court repeals the adm^n all the intermediate acts of the adm^r are good as a sale of goods to pay debts or a receipt of a debtor. That is all lawful acts are to stand & not be impeached & if he were a creditor he might retain his own debt. This goes upon the ground that the grant was not void, but voidable only. 1 Com. 264 Lov. 50. Cro Eliz 260. 6 Co. 18. 2^d Rdy. 684.

Tho this 2 S^t acts which are rightful are allowed are not binding. yet if the acts were wrong as if the first Ex^r was a good one the acts would bind. as if he gave away testators goods it would be good for he had a right to do this tho he might have been liable in Dower suit. but some would hold. But if the adm^n was granted by mistake the acts (1201 Ing) would be utterly void. because he could not be sued in Dower suit to set aside. Case P.C. was made Ex^r by a second will. M^c Camp was made Ex^r now before last will proved. P.C. acts which were lawful were binding but his wrongful acts not for the above reason that he could not be sued in Dower suit. M^c Camp could not sue for the gift was good agⁿ the giver who was in the place of Test. (a)

Cro Ch 460
3 Ves. b. 206
3 T. Rep. 120
1 Com. 264
2 Lev. 90

You will observe that I have mentioned the case of ecc. Ct. appointments & that not as one by the same Ct.

But suppose an appeal taken out to the higher court. now it is said that the intermediate acts of the first ct. are utterly void. If so then if a debtor be paid a debt to him he must pay it over again. What is the reason in this case. he is acting under the authority of the court. the same as the other case. the difference is. that the same court only rectifies a mistake. but when by appeal it is reversed. the appointments is rendered void. I confess I do not see the reasoning. and I conclude the rule laid down as incorrect. At first that that it applied only to the acts done between the confirmation by the appointing court and at which upon an appeal. but it refers to all acts In accordance with this. You will find that if such ct. had the same judg. against me. the Defr might have an audita querela. But suppose he had paid it over & then the other court had called again the Defr must pay it over again. tho he might recover back his first

pay[r]. But this wch appears to me unreasonable to drive the debtor about in this manner when he p[r]ays adm[r]. who has legal authority. Evidently when one adm[r]. is void all acts done under it are void. 2 Saund. 149. 1 Mod. 62. 10 Mod. 21. 389. 2 Bac. 412. 1 Salk. 38.

A case of an appeal when adm[r]. was granted upon a forged will & 4[r]. had done many acts. the court decided that all lawful acts done by first Ex[r]. were good. the appeal being upon a citation 8 T. Rep. 125.

It is said that all the cases of good appeal by the same courts were cases of actual intestacy. And it is contended that if there had been a will made. and that revoked by the courts all acts done under it would be void. Because it is said that adm[r]. can be granted only in case of intestacy. Many great lawyers say that the Ch. has jurisdiction over dead mens estate. and adm[r]. is to be granted immediately if no will appears. 1 Show. 211. 1 Com. 238. 264. 2 Lev. 183. 1 Vent. 303. 3 T. Rep. 130. Lev. 47. 177. 1 Salk. 37. L[d] Ray. 1210.

Again the Ch. has granted adm[r]. & when a will was discovered and the adm[r]. was repealed. Now the question is. are

the intermediate acts void. Some say yes because the 6t. had no jurisdiction. But Baller & Mansfield said not. 3 T Rep. 190. 1 Rev. 158 2 Lev 90. Com. Rep. 152. The case of two wills is the same.

When the court set aside his own appointment. Adr. authority ceases and he is liable to the rightful Adr. 2 2 Saund 137. & must deliver up all effects.

But it is laid down that his lawful acts before & pending the citation are good.

The only great question is whether the Adr. is void or voidable

If the Admr. is all void the Adr. must be an Exr. in his own wrong & what suits can maintain any acts go in mitigation of damages 2 Bac. 411 1 Com. Dig. 264. 1 Vin. 329. Plow. 279.

It is laid down that when the Adr. is made void, a debtor must pay his debt over again. 5 T. Rep. 130. 1. There Buller contends that whether the Adr. is repealed by citation or appeal. lawful acts are binding and there are authority to warrant these single opinions 1 Bac. 198. 2 Bac. 411 It is determined that payt. to Adr. de facto is good

Difference between Eng. & American Law.

In many points our law as it obtains in many states differs from the Eng.

By Eng law the personal is only the only fund to pay ~~such~~ debts. ~~that with~~ real & personal constitute a fund to pay ~~debts~~ debts, there is this in it. however that the personal fund is every where I believe a prior fund. This is turned into money. But there is not the same necessity here as in Eng. and so it is often agreed that the real shall pay the debts

with us if the personal will not pay the debts. & if Probate have power to sell so much of the real as will pay the debts or make up the deficiency — If all does not pay in full then must be an average. In such cases there is a law of limitations for exhibition of debts and the average is struck at the end of 11 mos. —

If the estate is represented insolvent. Com^rs are appointed to examine the account. what they reject is gone forever but if Ex^r chooses he may contest what they allow. then the average is struck. & if Ex^r recovers then is a new

average struck. If there is new estate discovered a new inventory is to be made and after accts are admitted who are to first finish made equal to the former averages & accts and then a new general average is struck —

By the law of several states there are no rank in debts. except debts to the public. after that the assets are equitable —

When a new discovery is made Ex: must be required to inventory if he will not you sue the bond. & when you recover the court set out your costs & then divide out to all debts. —

For U.S. Ex: cannot plead Plene Adm: undp. when it takes all to pay public debts. — if the estate is insolvent Def: pleads the circumstances.

With us then when we average. if the estate is insolvent there cannot be an Ex: in his own wrong the state knows nothing of it. you would by C. L. recover the whole. on "Ex: de son de" ante.

So I do not see how you can sue for divers assets for the same reason. the action must be on the bond.

In Eng. if L.D. devises blk acre to pay debts. it is not to be sold unless the personal is first exhausted but our courts say that the land is first to be sold & screw the heir and broken try and say that that was testators intention directly contrary to the Eng. construction. —

Duty of Ex & Adm^r after debts paid.

(Distribution) — Now bring to wills. I shall give you the rule of the stat of Ch^s for distribution of personal property which is the foundation of all laws of distribution in U.S.

Terms used in that stat are so to be interpreted when used in our state as they were in the Eng. courts.

Stat 22 & 23 Ch^s provides that where an intestate leaves wife children or rep. of children one third after pay^t of debts goes to wife as her property the other 2/3 goes to the children or their legal rep. the word children means issue all in the descending line. & the word is so used in our stat. & means the same thing if "issue" is used. he will find that the subject as if there were no widow if there were none the whole goes to the children. or their rep: The terms of

means childrn of childrn — The childrn take equally. if one of them were dead his childrn would take their father's part. so if the other one were dead. But if all the childrn were dead the grandchildrn take per capita. and not as before per stirpes. in this case each has an equal share. There is no difference as to male & female And a posthumous child takes with the others 1 Vez. 156. 2 Burns Ecc. 365. 2 Atk. 115 1 Vez. 85.

That the distribution is sometimes per stirpes & sometimes per capita all 2 Burns. 365 Cov. 74.

Representation in the descending line prevails in succession. — 1 P Wms 97 and ascending relations are always postponed to the descending ones.

In some parts of our country the distribution has been per stirpes wherein all were in equal degree. as where all descendants living were grandchildrn. but it appears to me wrong. for the same terms should receive the same construction 2 Vez. 215. 3 P Wms. 50. 1 P Wms 590 1 Atk 455.

The statute of N.Y. was made precisely after the stat of Ch. & all technical words were avoided.

& it affords proof of this construction. the State of Ohio has done the same.

Stat. of Ch. enacts that if there are no children after debts paid the Wo. takes half & the next of kin the other half. the only question then is who are next of kin. Decd calls those of next of kin. whether of whole or half blood. whether on the part of the father or mother. or whether male or female take equal shares. when of equal degree. 1 Ves. 437. 1 Vent. Smith 93. Tracy. 2 Ves. 124. 1 P. Wms 53. 2 Ves. 213. 1 Eth 454.

The degree of kin is determined by the civil law rule. count from intestate to common stock & then ascend to the person whose degree of kin you would have. 1 Ves. 334. 1 P. Wms 51. 41. 2 Ves. 214. 2 Bl. 510. to 515. 2 Ves 335. Lev. 78. Co Lit. 23. Har. note. Pr. Cha. 527. 1 Salk 251.

Now then you will have no difficulty if all next of kin can take. But the Statute says the next of kin and their legal representatives are to take. — By representation you are to understand that the children are to take what their parent would have taken. So if Id had brothers & brothers children they divide per stirpes but if only nephews & nieces, & cousins & aunts they take per capita. 2 Ves. 215. 3 P. Wms 50. 1 P Wms 595. 1 Eth 455. 2 Ves. 213. 1 Eth 452. as to uncles & aunts & grandfather see two cases cited.

So the grandfather would take a share with the nephews & nieces uncles & aunts.

This stat. also provides that representation shall not extend beyond brothers & sisters children. - You are not to understand that they are never to take. i.e. the grandchildren of brothers & sisters as next of kin. - for they can if all nearer relations are dead. but they are never to take by representation. 1 P.W. 2/7. 25.

The construction of this statute is that none are to take by representation beyond the third degree. So that an uncle and an uncles children are not to take together. the uncle would exclude his own nephews & nieces. 1 P. W. 575. 2 Vern 233. Pr. Cha. 28. Contra. 2 Vern. 168. bad Law

Prin is but an single departure from this rule in the Eng. books. It is this. The brothers & sisters and the grandfather according to principles are to share together bring in the second degree & so of uncles & aunts nephews & nieces in the third & so on. representation drawing up children to the place of their parents. Pr. Cha. 527. 1 Salk. 251. 1 P. W. 51.

Grandfather & brothers are entirely in the second degree and the

case decided brother to be preferd to the grand-father. L^d Hardwicke says that it is law. if he may that it is best to be so I agree with him that it is manifestly against the statute. He was influenced probably by the ancient Saxon decisions. Amb. 97. 3 Atk. 762. 1 W^ms 46. 3 ib. 448

The statute of 1 Jac. 2. c. 17 per acts. that the mother is to take equally with the brother & sister and not as she would under the statute of 6 E. 6. by. which she would have taken the whole exclusion of the brother & sister. if the father were dead. Indeed she is placed in all respects in the place of a brother or sister as she keeps up the stock so as to make the children of brother & sister take by representation and reduces the uncles. 2 P. W^ms 344. 1 Atk. 458.

But if she is in the second degree will not the grand father take with her? to prevent this you must not go to the decision of L^d Hardwicke. the truth is that she is in the first & will prevent any's going to the grand father.

In them are no relations in Eng. the property goes to the king. But we have no such character in the U.S. Many of the States have provided by stat for such an e-

and if he dies before distribution the estate goes to his heirs & not to the heirs of the original intestate. —

igency. Where they have not the executor or Adm. after debts paid will hold the residuum for any thing that I know.

The shares in acc. of the wife if not collected during coverture belong to her and if she dies in the life of the husband by the Stat. Ed. 3d & Hen 8. It was considered as the rightful Adm. and by stat of Ch. he was obliged to distribute to her most of him. But the 29th Ch. relieved him from the necessity of accounting after debts paid. This may make an important question in Md. or some of the U. in the state of 29 Ch. is not adopted. in such the residuum is to be distributed. 2 Bl. 504 Co. Ch. 106. 1 P.Wms. 381. 3 Atk 525.

It follows then that when the 22 & 23d & not the 29th of Ch. is adopted. the husband must distribute according to decisions made between the passage of those two acts.

The distributary share exists intanto in the person intitled to it. L. Chancellor says I conceive a child in ventre sa mere as in esse. 2 Vern 710 2 Atk. 118. 1 Salk 229.

It appears that a distinction was taken between the different conditions of a child in ventre sa mere. as being sub-

man or not. But we have nothing of it. 3 P. Wms 29.

Previous to the Stat of Dist the father by dead the mother took the whole while he was alive it would not answer no purpose to give it to her. 2 Burns Ec. law. 349. Lec. 74

Points in which U.S. (laws) differ from the Stat of Charles—

In et Hampshire the descending line is the same as by stat of Ch. in ascending & collateral there is this difference. that if a child dies unmarried (without issue inheritable) it goes to brothers & sisters & mother takes nothing.

In Vermont there is the same difference as in et Hampshire & in the collateral line males take double portions — Illegitimate may inherit on the part of the mother (to & from) & if a man marries a woman & owns her bastard to be his the child is to all intents & purposes legitimate. —

In Mass. the descending line is the same as by the Stat. but in the collateral line those are preferd who claim thro the nearest ancestor so that nephews & nieces are preferd to uncle & aunt.

In Rhode island there is no difference from the stat of Charles

In Conn. the descending line is the same. Brothers & sisters are preferd to parents, and those of the whole to those of the half blood but as to blood it only affects those of equal degree.

In N York & N Jersey I apprehend there is no difference as respects personal property.

In Pensylvania there is no difference in the descending line but much in the ascending & collateral line. If the estate came by the mother it does not go to the father. & so of the mother: in who would take the whole to exclude the brothers &c no difference as to whole or half blood. But the right of representation continues on ad infinitum - If no brothers or their representations. the estate goes to the next of kin & their legal representations.

Delaware as to personal property I am not informed as to their laws of descent. The case is the same with Virginia & North Carolina Georgia & Kentucky.

In Maryland the descending line is the same with the Statute of Ch. but one difference is if a man marry a woman who has a bastard & acknowledges the child to be his the child is legitimated. If there is no father no child or grandchild or brother or sister or child of brother or sister the widow

take the whole. I mistake here is no difference

In the collateral line the representation right goes on ad infinitum among brothers & sisters children. but in no other case.

Also lineal ancestors are postponed to the collateral relatives ex cept father & mother who take as under the Stat of Ch. Again the posthumous children of lineals take but not those of collaterals; under the stat of Ch. both take.

Ohio. The rule is the same as it is in Con. Brothers & sisters of the whole blood are preferred to parents and to brothers and sisters of the half blood. & so of grand parents. And those of the whole blood in whatever degree of kindred are preferred to the half of the same degree.

So Carolina— This is the first state that differs in the descending line from the statute.— The 2nd qu. children do not take per capita but by stirpes. where of equal degree—

If there be brothers & sisters & a father. the brothers &c inherit with the father just as they do with the mother under the stat of Jams.—

There is a difference in this two: where the

is a wife made & children born after and the after born children shall have a share with the other children when all had been settled away.

Where there is no issue or any on issue the ascending line or brothers or sisters or their children the widow then takes two thirds exclusively not as dower. although she takes as in the other states.

If there are brothers & sisters of the whole & half blood: the whole are preferred to the half blood. And the children of brothers &c. of the whole blood take equally with the brothers &c of the half-blood When brothers &c are all dead leaving children. their children take per stirpes & not per capita.—

Rules—

There are certain rules that apply in some states & in some not. Mass. Pennsylvania N. Hamp. R Island Maryland & Ohio have expressly directed the computation of kindred to be by the civil law. There are no state as to this is Vermont. Conn. York & N. Jersey. that custom has established it.

In N. Carolina computs by the common Law & not by the civil — & this is by Stat.

In the collateral line representation extends only to the 3d degree. Mass. N. Hamp. Rhode I. Conn. In Pennsylvania. N. York. Maryland. S. Carolina & N. Jersey. it is extended to brothers & sisters descendants as in Virginia but not to other Collaterals. In Delaware it is extended in case of all collaterals to the fourth degree In N. York it also extends to the children of brothers & then the computation is by the C. L.

Those states where the half blood inherit equally with the whole are Vermont. Connecticut N. Hampshire. N. York Rhode Island N. Jersey. Maryland. N. Carolina.
In Virginia the half inherit with the whole but only take half a portion. In S. Carolina the half blood is postponed & the nephew of the whole takes as much as a brother of the half blood.

Advancements—

If a child has an advancement (by state of Ch. & that part is copied by the states) during his life time. he must bring this into hotch-pot. to be entitled to distribution. by Eng. law that was considered as part of the father's estate. but most of the states have provided that the child shall keep that part & allow for it. Nothing

(b) But our Statutes declare the expence of a liberal education an advancement if found charged on the patrimony

but what comes from the father is an advancement as estate from the mother or grandfather. It is not every thing that constitutes an advancement.

Whatever is given by way of marriage settlements or to set a child up in the world is advancement but what is expended for maintainance, or spending money or even a liberal education it is no advancement (b) Pr Ch. 170. 1 Wils 446. 2 P Wms 434. Eq. Ca. Abg. 243. 2 Vern. 628. 2 Wils 435. 2 Bac. 430.

The value of the article at the time taken is to be the value in the inventory — The laws of different states alter the Englis. In Mass. the value is to be as charged on the father's books.

It has been contended that if a legacy be given in a will it is to be considered as an advancement but the courts said not. for for that purpose it must have been given in the father's life time —